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The extent to which stockholders of corporations may give power to others to vote, act and express for them their judgment on proposed measures is well illustrated by a recent decision of the Court of Chancery of New Jersey—Kreiss v. Distilling Co.,—though the courts of that State have had occasion heretofore to pass upon the general question as to the validity of agreements and combinations by which stockholders delegate irrevocably and absolutely to others the power of management and control of their stock. In one of the earlier cases—Taylor v. Griswold, 14 N. J. Law, 222, the Supreme Court of New Jersey, in dealing with the question of the reciprocal rights and duties of shareholders of private corporations, established the principle that the obligation and duty of incorporators to attend in person at meetings of the corporation, and execute the trust or franchise reposed in or granted to them, is implied in and forms part of the fundamental constitution of every charter in which the contrary is not expressed. They thereupon denied the right of such corporation to authorize any stockholder to vote by any power of attorney or proxy, unless power to do so had been expressly or impliedly conferred by the legislature. This conclusion was reached on the avowed ground that, by the association of the individuals in such corporation, each associate was expected to exercise his judgment upon all measures which he and his associates could take respecting the enterprise, which judgment his associates might assume would be favorable to his own interest, and consequently beneficial to their interest. The power to judge and determine upon such measures could not, except under legislative authority, be delegated to another. Since the decision of the case referred to, the New Jersey legislature has conferred upon stockholders of private corporations created by special laws or under general statutes the power to appoint a proxy to cast their votes. Notwithstanding this grant of legislative authority, questions have arisen as to the extent to which stockholders may confer authority upon proxies.

In Cone v. Russell, 48 N. J. Eq. 208, Vice Chancellor Pitney held void, as against public policy, an agreement between stockholders of a private corporation by which the owners of certain shares agreed with the owners of other shares to give the latter a proxy irrevocable for five years, and empower them to vote on the shares during that time, in consideration of which the latter parties agreed to so vote said shares as to procure the employment of one of the owners thereof as a manager of the corporation at a specified salary. This conclusion was reached notwithstanding the fact that relief by a declaration that the agreement was void was sought by one of the parties thereto, who was *in pari delicto*. In White v. Fire Co., 52 N. J. Eq. 178, 28 Atl. Rep. 75, the same vice-chancellor had to deal with a case presenting the following facts: All the holders of the stock of a private corporation which had then been issued entered into an agreement among themselves whereby their shares were transferred to a trustee, who issued to each stockholder an assignable trust certificate for the amount of his stock so transferred. By the agreement the trustee was required to so vote upon the shares that a majority of the directors should be elected upon the nomination of holders of certain certificates, being a minority of the whole number, and a minority of the directors should be elected upon the nomination of holders of certain certificates, being a majority of the whole number of such certificates. After discussing the question whether such an agreement could be sustained, as to those entering into it, for a purpose which was declared to be proper, and pointing out the apparently insuperable difficulties in carrying out its provisions, the vice-chancellor found it unnecessary to decide its validity as to the parties to the agreement, while remaining the sole owners of the stock or the beneficial interest in the stock issued; but as to the complainant, who had subsequently acquired shares of stock afterwards issued, and also some of the trust certificates representing original shares, he held that the agreement was unenforceable and void, as contrary to public policy. Some expressions in these opinions have led to the contention

that the vice-chancellor pronounced invalid any scheme or device by which the power to vote upon stock was separated from the ownership. That such was not his view is apparent from his language in Cone v. Russell, where he says: "This conclusion does not reach so far as to necessarily forbid all pooling or combining of stock where the object is to carry out a particular policy with a view to promote the best interests of all the stockholders. The propriety of the object validates the means, and must affirmatively appear." It is also apparent from the later decision of the same vice-chancellor in Chapman v. Bates, 46 Atl. Rep. 591.

The court, in the latest case on the subject, to which we first referred, held that in view of statutes permitting stockholders to give proxies, and under the doctrine laid down in the earlier cases it is impossible to maintain that a proxy which confides to the attorney thereunder the power to exercise his judgment in certain cases, and so separates the voting power from the ownership of the stock, is void *per se*. "The principal," says the court, "may, doubtless, limit the power conferred to voting on certain questions and in a certain way. But if, as is customary, the power is unlimited, it must be exercised by the judgment and determination of the attorney on any questions which may be presented. The power of revocation is deemed sufficient to protect the rights of other stockholders. If, however, the stockholder undertakes to make irrevocable his grant of power, and to denude himself for a fixed period of the power to judge and determine and vote as to the proper management and control of the affairs of the corporation, then whether the grant of power is good or not must depend on the purposes for which it is given. When the scheme devised does not embrace a grant of irrevocable powers by proxy, but seeks a similar object by the creation of a trust and the appointment of a trustee, to whom the title of the stock is conveyed, a like doctrine must be applied. If no provision is made for the conduct of the trustee, at least he would be bound to vote on the stock held in trust in accordance with the expressed wishes of the *cestui que trust;* but if the transfer of the legal title to the stock is made and accepted under an agreement of the stockholder which deprives him of all power to direct the trustee, and all opportunity to exercise his own judgment in respect to the management of the affairs of the corporation, then, whether the transaction is open to the objection of other stockholders, as depriving them of the right they have to the aid of their co stockholders, must be dependent upon the purposes for which the trust was created, and the powers that were conferred. If stockholders, upon consideration, determine and adjudge that a certain plan for conducting and managing the affairs of the corporation is judicious and advisable, I have no doubt that they may, by powers of attorney, or the creation of a trust, or the conveyance to a trustee of their stock, so combine or pool their stock as to provide for the carrying out of the plan so determined upon. But if stockholders combine by either mode to intrust and confide to others the formation and execution of a plan for the management of the affairs of the corporation, and exclude themselves by acts made and attempted to be made irrevocable for a fixed period, from the exercise of judgment thereon, or if they reserve to themselves any benefit to be derived from such a plan, to the exclusion of other stockholders, who do not come into the combination, then, in my judgment, such combination, and the acts done to effectuate it, are contrary to public policy, and other stockholders have a right to the interposition of a court of equity to prevent its being put into operation."

NOTES OF IMPORTANT DECISIONS.

CARRIERS OF PASSENGERS — RIGHTS OF PASSENGERS TO CARRY SMALL PARCELS IN PASSENGER CARS.—The decision of the Court of Errors and Appeals of New Jersey, in Runyan v. Central R. R., 47 Atl. Rep. 422, presents the latest phase of a litigation which has occasionally been before the courts. It was held that the evidence of usage presented was sufficient to support a verdict that the defendant company, a common carrier, had adopted a rule that passengers might carry with them in the passenger cars small parcels of merchandise belonging to them, and that a notice that passengers would not be allowed to act as express messengers was not inconsistent with such rule. It was further held that when a person has purchased a legal right to enter as a passenger the train of a common carrier, but is notified by an agent of the carrier that his right

is denied, he may nevertheless make reasonable efforts *bona fide* to exercise his right, and physical resistance interposed by the carrier's agents to such efforts will constitute a tort, and in an action therefor the indignity, as well as the personal violence, may be considered by the jury as an element of compensatory damages.

BOARD OF HEALTH—PROTECTION FROM DISEASE—ARBITRARY ACTION OF HEALTH OFFICERS.—Two recent cases in different States illustrate the general policy of the law toward the action of health officers and show that while boards of health, as a protection from disease, are frequently justified in taking summary and apparently arbitrary action, yet that such interference with liberty or property must be justifiable by the facts upon investigation. In City of Memphis v. Smythe, 58 S. W. Rep. 215, decided by the Supreme Court of Tennessee, it appeared that defendant, a physician, fearing that his child's illness was diphtheria, telephoned the health department that his child was sick with what he feared was diphtheria, but that another physician disagreed with him. The next day the child was practically well, the attending physician assuring him that there was no diphtheria. The day after the health department required a report of the diphtheria case at his house, and, although told there was no case there, placarded the house. It was held that defendant by tearing down the placard did not violate an ordinance requiring placards to be placed on houses containing contagious diseases, and prohibiting anyone but a health officer from removing them.

In Wilson v. Alabama, etc. R. R., 28 South. Rep. 567, decided by the Supreme Court of Mississippi, it appeared that, at the time of a yellow fever outbreak, the State board of health ordered that no person be allowed to get off trains or boats at any point or station in the State. Plaintiff was returning from N, a non-infected point, to his home, on defendant's train, and was ejected before reaching the State line, in obedience to such quarantine order. It was held that such order was no defense to an action for damages for such ejection, since it was void, as being unreasonable. The following is from the opinion in the latter case:

"The appellant was from Meridian, a non-infected point, and had a duly-issued health certificate, and was returning from Nashville, a non-infected point, to his home in Meridian, on a valid excursion return ticket. He had not been exposed to infection. The order was not that no person who had been exposed to infection, or who came from an infected point, or who was destined for an infected point, should be allowed to come into the State, but that no person who soever, from any point whatsoever, should be allowed to get off anywhere in the State. The authorities are uniform that this sort of order is wholly indefensible. It has been expressly so held in this State. Town of Kosciusko v. Slomberg, 68 Miss. 469, 9 South. Rep. 297, 12 L. R. A. 528, which also holds that the reasonableness of these orders is, of course, for the court to determine. And it has been so held in many authorities, among which see specially *In re* Smith, 146 N. Y. 68, 40 N. E. Rep. 497, 28 L. R. A. 820, the note to Hurst v. Warner (Mich.), 26 L. R. A. 484, 60 N. W. Rep. 440, and State v. Burdge (Wis.), 70 N. W. Rep. 351, 37 L. R. A. at p. 162, citing with approval of Town of Kosciusko v. Slomberg, *supra*."

CARRIERS BY WATER — THEIR RELATIONS WITH PASSENGERS.

[CONTINUED.]

10. The Contract of Carriage—Liabilities Under.
11. Passage Money—Recovery Thereof, by Carrier.
12. Liability of Carriers for Baggage Lost.
13. Salvage—Generally.
14. Death of Passenger on Board Ship—His Effects.

10. *The Contract of Carriage—Liabilities Under.*—A maritime contract depends upon its subject-matter, and, when entered into for the conveyance of goods or persons in a particular ship, it binds the ship. Her obligations result directly from the contract, and not from the performance, and the liability of the owner and that of the ship attach at the same time;[101] and the contract of carriage is consummated when the passenger pays, and the carrier accepts, the fare.[102] Furthermore, in the case of a contract, maritime in its nature and subject, it is not essential, in order to give jurisdiction to the admiralty *in rem*, that the vessel should have entered on the performance, or that the breach should have occurred during the voyage.[103] The owners of a ship are in general liable upon contracts made by the master with passengers, if the ship be employed for the carriage of passengers, and the master acts within the scope of his authority.[104] In respect to the liability of the ship for contracts made with the master for transportation for hire in the regular course of the vessel's occupation, the law makes no distinction between the transportation of passengers and of merchandise.[105] Where a passenger pays for a passage to a certain city, the carrier must land him there, unless excused by the health laws regulating its intercourse with that city.[106] In the absence of proof

[101] The Pacific, 1 Blatchf. 569; The Aberfoyle, *Id.* 360; The Zenobia, 1 Abt. Adm. 48.

[102] Lechowitzer v. H. A. P. Co., 59 N. Y. S. Rep. 486

[103] The Pacific, 1 Blatchf. 569.

[104] Abbott on Shipping, 18.

[105] The Zenobia, 1 Abt. Adm. 48; Brown v. Harris, 2 Gray (Mass.), 360.

[106] Gilhooly v. The N. Y. & S. S. N. Co., 1 Daly, 197; Brulard v. The Alvin, 45 Fed. Rep. 766. Low water in a given stream or harbor is no excuse for failure to carry to place of destination. Smith v. N. A. T. & T. Co., 20 Wash. 580.

of a contract on the part of a carrier to convey a passenger and his baggage from one city to another, it must be assumed that the carrier undertook to transport him and his baggage, according to established law, usage and custom, to the port of the city of the passenger's destination.[107] The published schedules, or time tables, of the carrier, are representations to the public as to times of departure, and of the periods within which journeys will be performed. They are public professions, up to which he must use diligence to act, and if he fail to perform his trips according to them he will be liable to the passenger, unless he shows that he has made reasonable exertions to do so, and has been prevented by accident and delays not attributable to his negligence;[108] and where the circular of a steamship company sets forth that one of its boats will sail from a certain port upon a given day (wind and weather permitting), and a deposit of a portion of the passage money is made, the same may be recovered, likewise the amount paid by a person intending to take passage therein—where the ship fails to sail—for expenses arising from delay in sailing. Under such circumstances such person may take passage by another vessel,[109] and it has been held in this country that it is no excuse if failure to arrive on time was due the ship's being disabled while on the way by stress of weather;[110] and under an act providing that "all steamers and vessels and boats shall be liable for nonperformance or malperformance of any contract for the transportation of persons or property, made by their respective owners, masters, agents, or consignees," a breach of such contract at any intermediate point, such as the Isthmus of Panama, renders the vessel liable;[111] but it seems that the ship owner would be entitled to recover half the passage money of a person who refused to sail another day, after having engaged a passage, unless either time was of the essence of the contract, or the delay in sailing was unreasonable.[112] If a boat expressly contracts to land a passenger at a particular point, with a knowledge of the danger of affecting a landing at that point, such danger will not be a good defense in an action for damages for non-fulfillment of the contract.[113] It is proper to join the husband and wife as plaintiffs in an action against a common carrier for a violation of his general duty to the public, in failing to comply with his engagement to stop his vessel at a particular place, whereby the wife was unable to take passage thereon.[114] A general ship having been advertised for a particular voyage, if her destination is in any respect altered, the owner is bound to give specific notice of the alteration to every person who ships goods on board, or has taken passage therein;[115] and where carriers of passengers agree to transport a person from one place to another by a particular vessel, which vessel, without the knowledge of either party, is a total wreck at the time, so that performance at the engagement is impossible, the only obligation resting upon the carriers is to return to the other party, with interest, the money paid by him upon a consideration which has failed.[116] The rule is the same when, after embarking, the ship is lost on the voyage, where the receipt given for the passage money sets forth that the same was paid for the passage therein to a given port.[117] Where passengers, by their own act, deprive the captain of an election to repair and continue the voyage commenced, but interrupted by perils of the sea, the owner may retain

[107] Klein v. The H. A. Packet Co., 3 Daly, 390.

[108] Hutchinson on Carriers, Sec. 604; Heirn v. McCaughan, 32 Miss. 17; Post v. Koch, 30 Fed. Rep. 208; Sunday v. Gordon, Blatchf. & H. Adm. 569.

[109] Cranston v. Marshall, 5 Ex. 395, distinguishing Yates v. Duff, 5 C. & P. 369.

[110] Cobb v. Howard, 3 Blatchf. 524; Van Buskirk v. Roberts, 31 N. Y. 661; Williams v. Vanderbilt, 29 Barb. 491.

[111] Ord v. Steamer Uncle Sam, 13 Cal. 369; Brown v. Harris, 2 Gray (Mass.), 359; Quimby v. Vanderbilt, 17 N. Y. 306; Dennison v. The Watoga, 1 Phila. 468; Pearson v. Duane, 4 Wall. 605.

[112] Yates v. Duff, 5 C. & P. 369.

[113] Porter v. Steamboat New England, 17 Mo. 290.

[114] Heirn v. McCaughan, 32 Miss. 17; The City of Panama, 101 U. S. 453. The master of a schooner had taken passage on a steamer to rejoin his vessel, but was carried past the place for which he had bought his ticket, and at which the steamer usually stopped; he was held entitled to recover, not only for his personal expenses and loss of time, but damages in the nature of demurrage for the detention of his vessel. The Canadian (Mich.), 1 Brown, Adm. 11.

[115] Peel v. Price, 4 Camp. 243. It has been held that a deviation made without notice, which prolonged the voyage six days, warranted the recovery of the passage money, although no special damage was proved. DeColange v. Chateau Margaux, 37 Fed. Rep. 157. In another case the facts were as follows: "A," the master of a vessel called the "Urania," lying at Amsterdam, for 1,750 guilders paid by "B" in advance, contracted for his passage and board from Amsterdam to Batavia. The vessel put into New York in distress, and the owner repaired and sent her upon a different voyage to Naples, but offered "B" a passage in another vessel which was ready to to sail from New York to Batavia, and was a larger and more commodious ship. "B," though he did not accept the offer, did not object to the change of the vessel, but said he had business to transact in Philadelphia, and could not proceed immediately to Batavia. In an action brought by "B" to recover back the passage money he had paid, it was held he was not entitled to recover any part of it. Detouches v. Peck, 9 Johns. 210.

[116] Briggs v. Vanderbilt, 19 Barb. 222. And see Brown v. Harris, 2 Gray (Mass.), 359; Watson v. Duykinck, 3 Johns. 335. Passengers may recover passage money paid, where ship is examined and pronounced unsafe before sailing, the contrary being the case, they declining to proceed in her. The Guardian, 89 Fed. Rep. 498; The Eugene, 31 C. C. A. 345; The President, 92 Fed. Rep. 673.

[117] Cope v. Dodd, 13 Pa. St. 33.

the passage money advanced.[118] A contract of passage is broken if a cabin passenger be not allowed the use of the cabin, or is compelled to share it with every hand on board; if he be not furnished with food as stipulated, and if his situation be rendered uncomfortable by hands on board being allowed to molest him;[119] but a passenger carrier is not bound, after a passenger has bought a berth and paid for it, to exchange same for a stateroom.[120] Damages may likewise be recovered where a passenger, persuaded to land at an intermediate point by the captain, is left behind, he being without fault.[121] If a husband be excluded from the regular table for misconduct, and his wife, not from compulsion, but from a wish to be with him, takes her meals with him in private, this will not amount to a breach of contract on the part of the captain so far as regards the wife.[122] "Passage tickets are generally to be egarded as tokens, rather than contracts, and are not within the rule excluding parol evidence to vary a written agreement."[123] A passenger is ordinarily bound by the conditions printed on his ticket;[124] where a ticket, in the body of it, declares it is subject to the conditions and regulations indorsed and on its face, and at the foot of it the passenger signs his acceptance thereof, conditions exempting the carrier from liability in certain cases are valid and will bind the passenger.[125] The fact that, to understand the conditions in a given case, it will be necessary to read a large quantity of printed matter, cuts no figure.[126] The rule that one who accepts a contract and proceeds to avail himself of its provisions is bound by the stipulations and conditions in it, whether he reads them or not, is as applicable to contracts for the carriage of persons as to contracts of any other kind.[127] The cases in which it is held that one who receives a ticket which appears to be a check showing the points between which he is entitled to be carried, and which contains conditions on its back which he does not read, is not bound by such conditions, do not fall within this rule,[128] for such a ticket does not purport to be a contract which expressly states the rights of the parties, but only a check to indicate the route over which the passenger is to be carried, and he is not expected to examine it to see whether it contains any unusual stipulations.[129] The precise question, in many cases, is whether the tickets in question were of such character that passengers taking them should have understood them to be contracts containing stipulations which would determine the rights of the parties in reference to their carriage. If so they would be expected to read them, and if they failed to do so they are bound by their stipulations.[129a] The purchaser of the return coupon of a first-class ticket, bearing no prohibition of transfer, is entitled to be transported as a first-class passenger, and a refusal to allow him such accommodations, without payment of full fare, amounts to a marine tort, for which a proceeding may be had against the vessel;[130] but one who accepts a free pass as a pure gratuity, on condition that he will assume all risk of personal injury, must be deemed to have accepted it on that condition, whether he reads it or not.[131] "Seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers for the sake of preserving their own; on the contrary, being common carriers and so paid to protect and carry the passengers, the seamen, beyond the number necessary to navigate a boat put off from a wreck, can claim no exemp-

[118] Marks v. M. & F. Ins. Co., 66 La. Ann. 126. "A," in consideration of $100 to be paid immediately, agreed that he would suffer "B" to proceed and go on his vessel as a passenger from New York to St. Thomas, and to load on board for transportation goods to the value of $600, and "B" paid down the $100 and went on board with his goods, but the vessel, soon after the commencement of the voyage, was shipwrecked and lost, but the goods were saved and delivered to "B," and he brought an action for money had and received to recover back the $100. It was held that this was an agreement to receive "B" and his goods on board, and not an agreement to transport and deliver them at St. Thomas, and that the plaintiff, therefore, was not entitled to recover back the money advanced for freight and passage. Watson v. Duykinck, 3 Johns. 335. And see Gillan v. Simpkin, 4 Camp. 241.

[119] Keene v. Lizardi, 6 La. 319; St. Amand v. Lizardi, 4 La. 532; The Pacific, 1 Blatchf. 569. As to birth claimed by two passengers: Dysart v. Montgomery, Irish Rep. 8 C. L. 245.

[120] Passengers may by their actions impliedly agree to be satisfied with deck accommodations. Defrier v. The Nicaragua, 81 Fed. Rep. 745; Miller v. N. J. Steamboat Co., 58 Hun, 424.

[121] Arayo v. Currel, 1 La. 192.

[122] Prendergast v. Compton, 8 C. & P. 454.

[123] Quimby v. Vanderbilt, 17 N. Y. 306; Van Buskirk v. Roberts, 31 N. Y. 661; Nevins v. The Bay State Steamboat Co., 4 Bosw. 225; Russ v. The War Eagle, 14 Iowa, 363.

[124] Fonseca v. Cunard S. S. Co. (Mass.), 27 N. E. Rep. 665.

[125] Navigation Co. v. Shand, 3 Moore, P. C. (N. S.) 272 to 288.

[126] Fonseca v. Cunard S. S. Co. (Mass.), 27 N. E. Rep. 665.

[127] Fonseca v. Cunard S. S. Co. (Mass.), *supra*, citing Grace v. Adams, 100 Mass. 505; Ins. Co. v. Buffum, 115 Mass. 343; Rice v. Mfg. Co., 2 Cush. 80; Hoadley v. Transportation Co., 115 Mass. 304; Ins. Co. v. R. R. Co., 72 N. Y. 90; R. R. Co. v. Chipman, 146 Mass. 107; Parke v. Ry. Co., 2 C. P. Dw. 416; Harris v. Ry. Co., 1 Q. B. Div. 515; York Co. v. R. R. Co., 3 Wall. 107.

[128] *Id.*; Brown v. Ry. Co., 11 Cush. 97; Malone v. R. R. Corp., 12 Gray, 388; Henderson v. Stevenson, L. R. 226, L. Sc. 470; Quimby v. Vanderbilt, 17 N. Y. 306; Ry. Co. v. Stevens, 95 U. S. 655.

[129] Fonseca v. Cunard S. S. Co. (Mass.), 27 N. E. Rep. 665.

[129a] *Id.*

[130] The Willamette Valley (Cal.), 71 Fed. Rep. 712.

[131] Rogers v. Steamboat Co., 86 Me. 261.

tion from the common lot of the passengers when it becomes necessary that some shall die in order that the rest may have some chance of escape.[132] If, during a voyage, a contagious disease breaks out on the vessel, and on her arrival in port the city authorities find it necessary, in order to prevent the spreading of the infection, to have her sick passengers sent to a hospital to be treated, the owners of the vessel cannot be made liable for the expenses incurred thereby.[133]

11. *Passage Money—Recovery of, by Carriers.*—In default of payment of passage money, the carrier may proceed at law to recover the same, or may hold the baggage of the passenger to secure it, or charges for extra baggage.[134] A carrier in the absence of a legislative enactment may charge what he chooses for the carriage of his passengers and their baggage, so long as the charge is reasonably and justly proportioned to the services rendered, and the risk incurred,[135] and no rule of law ordinarily prevents a carrier from prescribing a tariff of prices varying according to the value of the baggage carried.[136] If a carrier by water requires passengers to buy tickets before embarking and to give them up on disembarking, the loss of a ticket by a passenger falls on him, and he should on landing pay the amount of his fare;[137] and when such person attempts to land without a ticket, upon the claim that his ticket is lost, he may be prevented doing so a reasonable time in order that the matter may be inquired into.[138] While fare cannot be collected from a passenger traveling by invitation of the owner of a ship, in case there are several owners and the passenger is on board through the invitation of one of them, the latter will be liable to the rest for the carriage of his guest.[139] To justify a claim for *pro rata* compensation, the waiver of further carriage on the part of the passenger must be shown.[140]

12. *Liability of Carriers for Baggage Lost.*—The owners of a water craft are liable as common carriers for the loss of the baggage of passengers.[141] And this is so where they charter boat to another transportation company for a single trip, retaining the charge of it and navigating it with their own master and crew.[142] The custom is believed to be universal to allow passengers to carry, free of charge, such wearing apparel as may be necessary or convenient, and the fare paid by the passenger constitutes the consideration for the safekeeping and transportation of his ordinary baggage.[143] While the passenger carrier incidental liability to his patrons, strongly resembles that of an innkeeper, it presents the difference, that while in the former case it applies to no more property than what travelers ought to take with them on a journey, in the latter it covers whatever a traveler may have choosen to bring with him.[144] But in the case of an emigrant, who carries with him trunks and other ordinary baggage, and who in common turns over to the carrier several boxes of goods for transportation, and pays freight for the weight in excess of his baggage allowance, and the general character of the shipment is known to the carrier, the entire shipment will not be presumed to be of baggage, and in case of a loss there can be no recovery, except for such articles contained in the boxes as would properly be designated as necessary baggage.[145] An emigrant passenger by water has a right to bring with him suitable wearing apparel for himself and family, of the kind, quality and quantity befitting his station in life, having in view the object of his journey, and a provision in a ticket limiting the carrier's liability for loss of baggage to a less amount is invalid.[146] Where a passenger when taking passage informs the agent of the carrier what his baggage contains and no objection is made, the point cannot afterwards be raised by the carrier.[147] A statute (Rev. Stat. U. S., Sec. 4281), which prohibits any shipper of jewelry, gold or silver, etc., from lading such articles as freight or baggage, without giving notice to the master, of the character thereof, and having the same entered on the bill of lading, does not apply to a passenger carrying as baggage articles of jewelry and silverware, such as would ordinarily be regarded as a proper and legitimate part thereof.[148] Persons sending articles to a steamboat, which runs in the double capacity of a passenger and freight boat,

[132] U. S. v. Holmes, 1 Wall. Jr. 1. In the above case sixteen passengers out of thirty-two were thrown by nine seamen out of a long boat in the nighttime, there being imminent danger of the same being swamped; no lots were cast.

[133] City of New Orleans v. The Ship Windemere, 12 La. Ann. 84.

[134] Wolf v. Summers, 2 Camp. 631.

[135] Nevins v. The B. S. Steamboat Co., 4 Bosw. 226.

[136] *Id.*

[137] Standish v. Naraagansett S. S. Co., 111 Mass. 512.

[138] *Id.*

[139] Frazer v. Yeatman, 10 Mo. 501.

[140] Vilerboom v. Chapman, 13 M. & W. 230; Ship Nathaniel Hooper, 3 Sumn. 542; Griegs v. Austin, 3 Pick. 19; Caze & Richand v. Balto. Ins. Co., 7 Cranch, 358; Welch v. Hicks, 6 Cow. 504.

[141] Pardee v. Drew, 25 Wend. 459; Block v. Steamboat Trent, 18 La. Ann. 664.

[142] Campbell v. Perkins, 8 N. Y. 430.

[143] Wright v. Caldwell, 3 Mich. 51.

[144] Schouler on Bailments, sec. 666. See Mudgett v. The B. S. Steamboat Co., 1 Daly, 151; Hollister v. Nowlen, 19 Wend. 234; Cohen v. Frost, 2 Duer, 335; McKee v. Owen, 15 Mich. 115. Compare Clark v. Burns, 118 Mass. 275.

[145] The H. A. Packet Co. v. Gattman, 127 Ill. 598; Carlson v. Oceanic Steam Nav. Co. (N. Y.), 16 N. E. Rep. 546; Glovinsky v. Cunard S. S. Co., 26 N. Y. S. 751.

[146] Provision in ticket limiting liability to $100, held to be unreasonable. Moses v. H. A. Packet Co., 88 Fed. Rep. 329; Glovinsky v. Cunard S. S. Co., *supra*.

[147] *Id.*

[148] Carlson v. Oceanic Nav. Co. (N. Y.), 16 N. E. Rep. 546. And see Dunlop & Stewart v. International S. B. Co., 98 Mass. 371.

are required and have a right to designate what packages they ship as freight, and what they take with them as baggage. The owner of a boat in such case is not at his peril bound or permitted to open trunks and packages to ascertain what contain merchandise, and what wearing apparel, and to take care of them and charge for them accordingly, although he may, should he discover that he has, either by mistake or by fraudulent misrepresentations, or suppression of the truth, received as baggage what in truth was freight, correct the error, and charge for freight.[149] An assent by a passenger to a limitation of the carrier's liability will not be implied when such limitation is first communicated to him some time after he has paid his fare, and is at sea.[150] A carrier is not liable for jewelry in a traveler's trunk lost in transit, the same having been intended as presents, nor for masonic regalia, nor for engravings,[151] nor silverware;[152] but it seems that the converse is true in the case of a limited quantity of cloth, cut into patterns for garments;[153] likewise as to guns for sporting purposes,[154] likewise as to bedding to be used on voyage,[155] but not where the same is not intended for such use;[156] nor does any liability attach in case of the loss of a trunk containing a large amount of money in banknotes, deposited with ordinary baggage,[157] but money necessary for traveling expense and jewelry ordinarily worn can comprise baggage for the loss of which the carrier is liable.[158] But it seems that no liability will attach for the loss of money of one passenger contained in the valise of another and delivered by him as his own luggage, and received by the carrier as such.[159] Whether the amount of jewelry or of money carried by a passenger upon a given occasion was or was not reasonable is a question of fact for the jury. In determining such question as to amount of money that would be reasonable in a given case, the requirements of the entire journey should be taken into consideration, and its character, and a passenger is justified in prudently providing for possible accidents and illnesses[160] A *prima facia* case is established where the contract of carriage and assignment of state rooms is undisputed, and it appears that the passenger was not guilty of contributory nebligence.[161] Where a passenger leaves a passenger vessel at quarantine, and upon inquiry by the captain replies that there is no money in a trunk left behind, the fact being otherwise, there can be no recovery for the loss of the trunk or for any of its contents.[162] But a passenger may recover when the boat arrives in the nighttime, and he remains on board until morning at the invitation or by the permission of the captain, and his luggage is destroyed by the burning of the ship during the night.[163] A person having once been received on board as a passenger is entitled to the safe-keeping of his baggage, although his passage money has not been paid.[164] But the carrier is not usually liable for loss where ordinary baggage is retained by the passenger in his exclusive possession,[165] but in the absence of a requirement that luggage not intended for daily use be deposited in a place designated, the passenger need not of his own motion, in order to hold the carrier responsible for the safety of his luggage, place it beyond his reach in the special charge of the ship's officers.[166] In a New York case, where suit was brought by a person who had been a passenger upon a steamboat, to recover the value of a valise which he had deposited in his state room it having been taken therefrom, he having locked the door after leaving the same therein, it being contended that there was no liability because the luggage in question was not delivered to the defendants who had a regular baggage master to receive and care for luggage, the court held that the defendant's liability was the same as that of an innkeeper, and that it was no excuse for the latter to say that a key to the state room was delivered to the plaintiff; further, that a mere supervision of one's baggage or the means of entering the place of its deposit is not sufficient to discharge the carrier, and that there must either exist, the *animo custodiendi* on the part of the traveler to the exclusion of the carrier, or he must be guilty of such neg-

[149] Bersley v. Newton, 10 How. Pr. 490.

[150] Lechowitzer v. Hamburg American Packet Co., 28 N. Y. Sup. 577.

[151] Nevins v. The B. S. Steamship Co., 4 Bosw. 225; Bonner v. Blum (Tex.), 25 S. W. Rep. 60; The Ionic, 5 Blatchf. 538.

[152] Bell v. Drew, 4 E. D. Smith, 59; The Ionic, 5 Blatchf. 538. Compare Dunlop & Stewart v. International S. B. Co., 98 Mass. 371; Carlson v. Oceanic S. Nav. Co. (N.Y.), 16 N. E. Rep. 546.

[153] Duffy v. Thompson, 4 E. D. Smith, 178.

[154] Van Horn v. Kermit, *Id.* 403.

[155] Hirschsohn v. Hamburgh Am. Packet Co., 2 J. & Sp. 521.

[156] Connelly v. Warren, 106 Mass. 146.

[157] Orange Co. Bank v. Brown, 9 Wend. 85.

[158] Torpey v. Williams, 3 Daly, 162; McKay v. Owen 15 Mich. 115; Merrill v. Grinnell, 30 N. Y. (3 Tiffney) 594; Dunlap & Stewart v. International S. B. Co., 98 Mass. 371; Duffy v. Thompson, 4 E. D. Smith, 178; Crozier v. The B. N. Y. & N. Steamboat Co., 43 How. Pr. 466; Adams v. N. J. S. B. Co., 151 N. Y. 163. Compare Grant v. Newton, 1 E. D. Smith, 95; Steamboat Crystal Palace v. Vanderpool, 16 B. Mon. 303; Clark v. Burns, 118 Mass. 275.

[159] Dunlop & Stewart v. International S. B. Co., 98 Mass. 371.

[160] Bonner v. Blum (Tex.), 25 S. W. Rep. 60; Merrill v. Grinnell, 30 N. Y. 596.

[161] Adams v. New Jersey S. B. Co., 59 N. Y. S. Rep. 720.

[162] The Ionic, 5 Blatchf. 538.

[163] Prickett v. N. O. Anchor Line, 13 Mo. App. 436.

[164] Van Horn v. Kermit, 4 E. D. Smith, 453.

[165] Cohen v. Frost, 2 Duer, 335; Moore v. Steamer Evening Star, 20 La. Ann. 402; Forbes v. Davis, 18 Tex. 268; Defrier v. The Nicaragua, 81 Fed. Rep. 745. But see Mudgett v. The B. S. Steamboat Co., 1 Daly, 151.

[166] Van Horn v. Kermit, 4 E. D. Smith, 453.

ligence as discharges the latter from his general obligation.[167]

It has been held in case of ferrymen that property carried upon a ferry boat in the custody and control of the owner, a passenger, is not at the sole risk, either of the ferrymen or the owner. In such cases the ordinary rules governing in actions for negligence apply; and a plaintiff cannot recover if he is guilty of negligence on his part, contributing to the loss.[168] Passengers by water while up and awake, or when or where they ought, and are expected to be awake, must rely upon their own vigilance for protection against larceny from their persons; and in such cases such property as is carried on one's own person is in his own keeping; and it would seem clear that if a passenger, while in a general cabin or elsewhere about the boat in any place (or at a time) not specially designated for sleeping, suffer himself to fall asleep, he does so at his own peril.[169] A carrier of passengers has the right to establish any reasonable regulation which he considers necessary to secure the safety of the baggage of his passengers; and if the passenger knows of the regulation, and his baggage is lost through his neglect or refusal to comply with it, the carrier is not answerable. But to impose that responsibility upon the passenger, notice should be given him of the regulation, or it should be shown expressly that he knew it, or that it had become by general usage so notorious and universal that he must or ought to have known it.[170] Where a notice is posted in a passenger boat setting forth that the carrier will not be responsible for unchecked baggage, such notice cuts no figure, where in a given case a check is not delivered upon demand, the baggage being subsequently lost.[171] But an established, uniform and notorious usage of business, or an actual notice brought home to the passenger, in such form as to call on him, in fairness to the carrier to disclose when he applies for passage and pays his fare, how much baggage he desires to have carried, or in which class of passengers he desires to be ranked and charged, would absolve such carrier from any greater liability than such as corresponds with the classification which he has established.[172] Carriers by water are likewise responsible for the loss or damage done to baggage which has been placed in the custody of the officer of the vessel whose duty it is to receive and take care of it, even before the same is placed on board.[173] A notice printed on the back of a ticket exempting the carrier from liability not referred to therein, and not called to the passenger's attention, or assented to by him, forms no part of the contract of carriage, and is no defense in case of loss of baggage.[174] The proper view to be taken in such cases depends much upon the form of the ticket,[175] but a condition on the back of such ticket referred to on its face at the bottom by the words "see back," limiting the carrier's liability for baggage to a certain amount, unless extra payment is made, is binding on the passenger, where he receives the ticket in time to examine it thoroughly before embarking. A ticket should contain a distinct declaration or reference by the carrier in that part of the same which contains his contract, with respect to limitations in derogation of his common-law liability, so that it may manifestly appear that such limitations could not have been misunderstood in a given case and were accepted by the passenger. These exemptions must be directly stated, or the assent of the passenger will not be inferred. Attempts by indirection to obtain an assent to exemptions, will not, unless the attempt is positively sanctioned by the passenger, receive the favor of courts.[176] And where a carrier demands and receives extra freight for carrying a passenger's baggage, such a person is not limited in his recovery for its loss by the provisions of his ticket;[177] a passenger is not, by merely accepting a ticket, bound by a special provision therein limiting the liability of the carrier for loss of

[167] Mudgett v. The B. S. Steamboat Co., 1 Daly, 151; Robinson v. Dunmore, 2 B. & P. 416; Burgess v. Clements, 4 M. & Sel. 310; Tower v. Utica & Schen. R. R. Co., 7 Hill, 47; East India Co. v. Pullman, 1 Strange Rep. 604. A carrier by water is liable for the loss of an overcoat left in the stateroom by a passenger who locks the door upon going out of same. Gore v. The N. & N. Y. Transportation Co., 2 Daly, 254.

[168] Wyckoff v. Queens Co. Ferry Co., 52 N. Y. (7 Sickels) 32; Dudley v. Camden & Philadelphia Ferry Co., 16 Vr. (N. J. L.) 368. But see Fischer v. Clisbee, 12 Ill. 344; Wilson v. Hamilton, 4 Ohio St. 722.

[169] McKee v. Owen, 15 Mich. 115.

[170] Macklin v. N. J. Steamboat Co., 7 Abb. Pr. (N. S.) 229. It is held in the above case that any regulation, the effect of which would be to prevent a passenger from keeping in his stateroom articles necessary for his comfort from day to day, such as changes of clothing and toilet articles, would be unreasonable. And see Crozier v. The B. N. Y. & N. Steamboat Co., 43 How. Pr. 466.

[171] Freeman v. Newton, 3 E. D. Smith 246.

[172] Nevins v. The B. S. Steamboat Co., 4 Bosw. 225.

[173] Moore v. Steamer Evening Star, 20 La. Ann. 402. In the above case a passenger's trunk was dropped from a boat into the water while being conveyed to a ship from a wharf, and upon being brought upon board was placed in the hold until the end of the voyage, when it was found that its content were ruined. In "Majestic," 56 Fed. Rep. 244, the baggage of a passenger was injured by reason of water entering a broken port hole, the court held, it being contended that the port was forced open by wreckage, that the ship was responsible for the damage, it appearing that it steamed at full speed through the wreckage in question. But see The Majestic, 60 Fed. Rep. 624, wherein the above view is questioned.

[174] The Majestic, 56 Fed. Rep. 244.

[175] Fonseca v. Cunard S. S. Co. (Mass.), 27 N. E. Rep. 665.

[176] The Majestic, 60 Fed. Rep. 624.

[177] Wasselberg v. Cunard S. S. Co., 28 N. Y. S. 520; Glooniski v. I. I. Co., 2 N. Y. S. 751.

baggage;[178] while special contract terms modifying his liability for baggage may be imposed by the carrier, subject to certain conditions, such terms must be consonant with public policy, and seasonably brought to the passenger's knowledge.[179] A carrier is liable for baggage demanded within reasonable time by its owner, although previously delivered to a third person upon a forged order;[180] and a statute prohibiting traveling or secular work on Sunday cannot affect the liability of a carrier, nor can the fact of such statute being in force excuse a passenger by boat which arrives at a port upon Sunday from demanding his baggage within a reasonable time thereafter in the absence of an arrangement for its keeping.[181] Where a contract of carriage is made in a foreign country, whereby a passenger and his baggage is to be brought to this country, the ship owner being a foreign corporation, and the passenger a citizen of this country, such contract is a foreign contract and must be governed by the law of the country where the same is made, unless it clearly appears that it was the mutual intention that the same should be governed by the laws of this or some other country.[182]

A common carrier may limit his obligation in view of the existence of a public regulation at the place of delivery by which the baggage of passengers, when landed, is taken into the possession of the public authorities, who assume the exclusive right thereafter of delivering it to them, and which devests the carrier of all further custody and control of it; but to entitle him to the benefit of this qualification, it must either be express or implied by the nature of the contract.[183] A ship having arrived in port, the ship's officers or the owners have a right to require the passengers to remove their baggage within a reasonable time, and so to exonerate themselves from responsibility as carrier for its safe-keeping. If baggage is not removed within such time, the carrier continues liable as bailee if a loss occurs through its negligence.[184] Where it is the custom of carriers by water to deliver luggage of passengers upon arriving at the port of destination to a railroad company, obtaining checks therefor to be duly handed to the owners thereof, such carriers will be liable for the loss of luggage arising from the neglect of their employees to make the delivery according to custom.[185] A carrier is likewise liable where the baggage is lost by being landed at a wrong station, through the mistake of an employee;[186] and trespass will lie against a ship owner who declines to allow a passenger, whom he has agreed to carry, to proceed in a given vessel upon the voyage in question and sails, taking his baggage or a portion thereof.[187] "In an action by a passenger against a carrier for the loss of his baggage, the proper measure of the plaintiff's recovery is the fair market value of his property. This must be ascertained by the jury, and must be based upon some evidence;"[188] and it would seem that only such damages may be recovered in a given case, as were contemplated, or might be reasonably supposed to have been contemplated, by the parties to the contract of carriage.[189] Usage among ordinarily prudent carriers of the same class under similar circumstances will largely determine what care, skill, and diligence should be employed toward averting or lessening the injurious consequences of a disaster otherwise excusable. But usage cannot be set up to absolve a carrier from the ordinary duties which public policy, his general undertaking, or an express promise may have bound him to;[190] and in such cases the proof should be of a usage, certain, uniform, and so notorious as probably to be known to the parties entering into the contract, and it cannot be proved by single, isolated instances.[191] If, in such cases, the passenger does not accompany it, the carrier may claim compensation in advance for the transportation of baggage, or may postpone his claim until de-

[178] Lechonitzer v. Hamburg American Packet Co., 27 N. Y. S. 140.

[179] Schouler's Bailments & Carriers, sec. 689.

[180] Powell v. Meyers, 26 Wend. 591.

[181] Jones v. The N. & N. Y. Transportation Co., 50 Barb. 193.

[182] The Majestic, 60 Fed. Rep. 624. And see in this connection The P. & O. S. N. Co. v. Shand, 3 Moore P. C. C. (N. S.) 272.

[183] Klein v. The H. A. Packet Co., 3 Daly 390, citing Murchamp v. Lancaster & Preston Ry. Co, 8 Mees. & W. 421; St John v. Van Santvoord, 25 Wend. 660, 6 Hill. 157. In the above case certain baggage was lost after having been delivered upon an emigration barge for transportation from Hoboken to the city of New York, and while in charge of subordinates of the commissioners of emigration. Held, in the absence of evidence going to show that the carrier had contracted to carry the passenger and his baggage to the city of New York, that it was not liable for the loss, but that such subordinates were liable therefor. See Torpey v. Williams, *Id.* 102.

[184] Van Horn v. Kermit, 4 E. D. Smith, 453. Twenty-four hours was held to be a reasonable time in the above case. Jones v. The N. & N. Y. Trans. Co., 50 Barb. 193. In this case failure to present check for baggage for seventeen hours held to have made the carriers mere gratuitous bailees. Laffrey v. Grummond, 41 N. W. Rep. 394; Gilhooly v. The N. Y. & S. S. N. Co., 1 Daly, 197.

[185] Fisher v. Geddes, 15 La. Ann. 14.

[186] Blossman v. Hooper, 16 La. Ann. 160.

[187] Holmes v. Doane, 3 Gray, 328.

[188] Thompson's Carriers of Passengers, 536; Glovinsky v. Cunard S. S. Co., 26 N. Y. S. 751.

[189] Brock v. Gale, 14 Fla. 523.

[190] Schouler's Bailments & Carriers, sec. 448, citing Baxter v. Leland, 1 Blatchf. 526; The Schooner Reeside, 2 Sumn. 567; Rich v. Lambert, 12 How. 347; Newall v. Royal Shipping Co., 33 W. R. 342; Merx v. Steamship Co., 22 Fed. Rep. 680; Cox v. Heisley 19 Pa. St. 243; Cox v. Peterson, 30 Ala. 608; Steamboat Sultana v. Chapman, 5 Wis. 454; MacMasters v. Penn. R., 69 Pa. St. 374.

[191] Cope v. Dodd, 13 Pa. St. 33. And see Clinton v. Root, 58 Mich. 182.

livery and rely on his lien, or on the personal responsibility of the owner; in either of which cases, the carrier is responsible for the safe-keeping and delivery of the baggage.[192] In an action to recover for the contents of a trunk lost while in the hands of a carrier by water, the declaration should aver that plaintiff was a passenger on board his boat, and that in consideration of a reasonable sum paid, or to be paid, the defendant agreed to convey him and his baggage to a given port, or that his baggage was received, and accepted to be carried for a reasonable consideration as freight.[193] If a trunk is deposited with a carrier without being accompanied by a passenger, it is received as freight, and is liable to the payment of ordinary charges, and notice of its delivery to the carrier and of acceptance must be given according to the rules of law, before any liability can attach in case of loss;[193a] but the mere payment of extra compensation on account of the overweight of baggage does not convert such baggage into freight.[194] A capture by public enemies of the property intrusted to a common carrier releases him from all further obligation respecting it.[195] At common law a party was not permitted to testify in his own behalf. But on the principle of necessity, this rule has been relaxed in a particular case, that of the loss of a trunk or closed receptacle with its contents, where only the plaintiffs or party in interest can disclose what those contents were, and the circumstances in connection with the bailment and the original contract fail to establish the fact; as to the extent of this exception, however, the authorities are not clear or harmonious; though independently of legislation, the better authority tends to confine it to cases where no other certain testimony, less *ex parte* in character, is accessible.[196]

13. *Salvage—Generally.*—A salvor is a person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship.[197] Several English cases seem to hold that passengers, rendering services to a ship, where there is a common danger, are not entitled to salvage reward, as where passengers voluntarily remaining on board a vessel injured by a collision, work at the pumps.[198] It is observed by a well known text-writer, that a passenger is not bound to remain on board a ship in distress, unless in a case of imminent danger, where his exertions are necessary to preserve the vessel, and the lives of the crew, and that he may leave her if he has any opportunity to do so; if he remains and assumes any responsibility in the conduct of the ship, or performs any service beyond the mere line of his duty, he will entitle himself to a share of the salvage reward.[199] But where a master contracting a sickness in a foreign port engages the services of a personal attendant, such services are not a charge upon the vessel or her owners.[200]

14. *Death of Passenger on Board Ship—His Effects.*—It is the duty of the captain of a vessel to take charge of the effects of a passenger, who dies on board, and is liable if he fails to do so, and the same are lost.[201] The delivery of the effects of a deceased passenger to the agent of the administrator appointed in one State, before the appointment of a curator in the State wherein he died, will discharge the master.[202]

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[192] The Elvira Harbeck, 2 Blatchf. 336.

[193] Wright v. Caldwell, 3 Mich. 51.

[193a] *Id.*

[194] The H. A. Packet Co. v. Gattman, 127 Ill. 598.

[195] Spaids v. The N. Y. Mail S. S. Co., 3 Daly, 139.

[196] Schouler's Bailments & Carriers, sec. 580, and cases cited. See Wright v. Caldwell, 3 Mich. 51.

[197] The Neptune, 1 Hagg. 236.

[198] The Connemara, 108 U. S. 352; The Vrede, Lush. 322, following The Branston, 2 Hagg. 3n. And see 21 Am. & Eng. Ency. of Law, 673, citing The Brabo, 33 Fed. Rep. 884; Hobart v. Drogan, 10 Pet. 108; Kidney v. The Ocean Prince, 38 Fed. Rep. 259; Anastasia, 1 Ben. 166; Beane v. Mayurka, 2 Curt. 72; Brady v. The Amer. S. S. Co., 1 Am. L. T. (N. S.) 402. Compare Bond v. Brig Cora, 2 Wash. 80.

[199] Flanders on Maritime Law, § 410. And see The Two Friends, 1 Rob. 285; The Advance, *Id.* 306; Bond v. Brig Cora, 2 Wash 80; McGinnis v. Steamboat Pontiac, 5 McLean C. C. 359. A ship being in danger and the captain and part of the crew having made their escape, a passenger at the request of the rest of the crew took the command and brought the ship safe to port. The merits of the passenger in saving the ship were acknowledged by the owner in a letter to one of the underwriters, wherein he expressed his desire to make him a compensation. Held, that the passenger was entitled to salvage. Newman v. Walters, 3 B. & P. 612. In an another case the Great Eastern, having disabled her paddle wheels and broken her rudder shaft in a gale, lay in the trough of the sea for about thirty six hours, during which time, the officers of the ship had endeavored in vain to repair the damage. The libelant, one of the passengers on board, with the consent of the captain, undertook to put in execution a plan which he had devised for steering the ship, superintending the work, and succeeded in remedying the difficulty so that the vessel reached port in safety. Held, that these were extraordinary services for which salvage compensation were awarded. Fowler v. The Great Eastern, 11 L. T. (N. S.) 516; Sunday v. Gordon, Blatchf. & H. Adm. 569; Clayton v. The Ship Harmony, 1 Pet. Adm. 70. In another case it was held that United States soldiers, who were being transported by steamer from New Orleans to New York, were entitled to salvage, they having rendered services that resulted in saving the steamer from destruction. The Steamer Merrimac, 1 Ben. 201.

[200] Sunday v. Gordon, Blatchf. & H. Adm. 569.

[201] Malpica v. McKown, 1 La. 92.

[202] Walker v. Goslee, 11 La. Ann. 389. Should the clerk of a steamer take possession of the effects of a deceased passenger on his own responsibility without being authorized or directed by the master, the latter is not liable. *Id.*

MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—ASSESSMENTS—VALIDITY.

HADLEY v. DAGUE.

Supreme Court of California, October 4, 1900.

The street improvement act (St. 1891, p. 196, ch. 147), cannot be held unconstitutional, as making an arbitrary apportionment of the expenses according to the frontage of the lots, and not requiring that the assessment on each lot shall be made in proportion to the benefits received by that lot, so as to invalidate an assessment thereunder, without proof showing the assessment to be unjust.

HARRISON, J.: Action upon a street assessment. The common council of the city of Los Angeles passed an ordinance for the improvement of Main street in that city, between Ninth and Thirty-seventh streets. Plans and specifications, together with an estimate of the cost of the work, were furnished by the city engineer prior to the passage of the resolution of intention; and in that resolution the city council declared that it found upon such estimate that the cost of improvement would be greater than one dollar per front foot along each line of the street, including the cost of intersections, and that in accordance with the provisions of the act of February 27, 1893, serial bonds extending over a period of 10 years would be issued to represent its cost. After the completion of the work, and issuance of the assessment therefor, demand and return of non-payment were made thereon. Thereafter the appellant, whose property had been assessed for its proportion of the cost of the work, notified the city treasurer, in accordance with the provisions of the aforesaid act, that he desired no bond to be issued for the assessment against his land, and accordingly no bond therefor was issued. The assessment not being paid, the present action was brought for its enforcement by a sale of the land. Judgment was rendered in favor of the plaintiff and a new trial denied, from which defendant has appealed.

It is contended by the appellant that the assessment is invalid by reason of the unconstitutionality of the statute under which it was made, in that the statute makes an arbitrary apportionment of the expense according to the frontage of the lots, and does not require that the assessment upon each lot shall be made in proportion to the benefits received by that lot. The constitutionality of the statute has been upheld by this court so frequently that it is not an open question, but the appellants insist that the decision in Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. Rep. 187, 43 L. Ed. 443, wherein it was held that the assessment therein considered was in contravention of the constitution of the United States, is at variance with these decisions, and requires them to be disregarded. If the facts and statute under which the present assessment was made were of the same character as those involved in that case, we would, without hesitation, accept that decision as conclusive upon us; but we are of the opinion there is a marked distinction between the two cases, and that that decision is not applicable to the facts herein. In Village of Norwood v. Baker, the question considered by the court was the validity of an assessment for the cost of opening a new street, including the value of the land taken and the cost of its condemnation, and whether the same could be taxed upon the owners of the land abutting upon that taken, irrespective of any consideration of the benefits received by that land. The assessment therein involved did not include any of the expense of improving an existing street, and whether such expense may be assessed upon lands fronting upon the street within certain limits designated by the legislature was not presented or discussed in that opinion, and, although the "improvement" of the street is frequently mentioned in the opinion, this expression is to be read in the light of the question to be determined by the court upon the facts before it. The village of Norwood desired to open and extend Ivanhoe street for the distance of 300 feet from its termination, through the lands of Mrs. Baker, and for that purpose instituted proceedings for the condemnation of a portion of her land 50 feet in width. The constitution of Ohio required that the compensation to be paid to the owners of land thus taken should be made in money, and should be assessed without deduction for benefits to any other property of the owner, and the statute required that the cost and expense should be assessed only on the land bounding and abutting thereon. The ordinance for the condemnation provided, as authorized by the statute of Ohio, that the entire cost of the proceedings, including the money paid for the land, should be assessed per front foot upon the property bounding thereon. In the proceedings for the condemnation of the land, its value was assessed at $2,000, and this amount of money was paid to Mrs. Baker out of the public treasury. Thereafter an assessment — the assessment in question — for the amount so paid to her, together with the costs incurred in the condemnation was made, under the above statute, against the two portions of her lot remaining upon either side of the land which had been condemned for the street. It is thus seen that the assessment was not made for the cost of any improvement of any existing street, wherein it may be presumed that the adjacent lots are benefited, but was made solely for the purpose of reimbursing the public treasury for the expense of opening a new street. Its effect was to compel Mrs. Baker, under the guise of an assessment, to pay back into the treasury, not only the money that she had received as compensation for the land taken from her, but also the expense that had been incurred in its condemnation. This was, in effect, the imposition of a tax upon her land for the purpose of reimbursing the treasury for the money which it had paid out for the use of the whole public. The proceeding was a direct sequence in the exercise

by the village of its right of eminent domain, since the exercise of this sovereign power includes the payment to the owner for the land, as well as the determination that the taking is necessary for a public use. The mode in which the village could reimburse itself for such payment was by means of taxation, and, if the exercise of this power was not to be borne equally by the whole public, it could be imposed only upon those who were determined to have been actually benefited by the improvement. It needs but little argument to show that by these proceedings Mrs. Baker's property was taken for a public use without any compensation therefor; and inasmuch as, under the constitution of Ohio, she was entitled to receive compensation in money for the whole value of the property taken, irrespective of any benefits to her remaining property, the court very readily held that she was compelled, under the guise of an assessment, to part with her property without due process of law.

The principle invoked, that the assessment must be in proportion to benefits, was not disputed in the case, the only question being as to the application of that principle to the facts before the court; and its conclusion was reached by reason of the inhibition of the statute and constitution of Ohio from considering whether the land assessed had received any benefit by reason of the opening of the street. In no portion of the opinion is it intimated that an assessment for the improvement of an existing street upon the lands abutting thereon, according to their frontage, within the district designated or prescribed by legislative authority, is invalid; nor did the court question the correctness of any of its previous decisions, many of which are cited in the opinion, in which assessments under such a rule had been sustained. In Mattingly v. District of Columbia, 97 U. S. 692, 24 L. Ed. 1098, that court had said: "Special assessments for special road or street improvements very often are oppressive, but that the legislative power may authorize them to be made in proportion to the frontage, area, or market value of the adjoining property, at its discretion, is, under the decisions, no longer an open question." In Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. Rep. 966, 42 L. Ed. 270, it had said: "The class of lands to be assessed for the purpose [of a public improvement] may be either determined by the legislature itself by defining a territorial district or by other designation, or it may be left by the legislature to the determination of commissioners, and may be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. The rule of apportionment among the parcels of land benefited also rests with the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the land, or in proportion to the benefits as estimated by commissioners," citing in support thereof "the very able opinion" of Judge Ruggles in People v. Brooklyn, 4 N. Y. 419, and many other cases. In Irrigation Dist. v. Bradley, 164 U. S. 176, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369, the court held that an *ad valorem* assessment for local improvements was not of itself a violation of the principle upon which it should be made, saying: "It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefit it has received which is open to the discretion of the State legislature, and with which this court ought to have nothing to do."—and cites in support of this principle Cleveland v. Tripp, 13 R. I. 50, saying that it is a case "which treats this subject with great ability," and in which the Supreme Court of Rhode Island upheld an assessment for a sewer upon the abutting property, which was "mathematically determined by area and frontage," as constitutional and valid.

The mode in which the expense of the local improvement shall be borne, as well as the district which is to bear such expense, and the manner in which the expense is to be distributed, is a legislative question. The principle upon which the expense is charged on the property in that district is that that property has received a particular benefit. But, as was said by Mr. Justice Temple in Lent v. Tillson, 72 Cal. 428, 14 Pac. Rep. 71, "The benefit is not the source of the power." Nor does the validity of the assessment depend upon the ability to show that the property assessed was specifically benefited by the amount of the assessment, or received that particular amount of benefit. Courts will uphold an assessment made upon such legislative authority, even though the benefits are not shown to be identical with the burden. In Litchfield v. Vernon, 41 N. Y. 123, the legislature had authorized the improvement of a street, and designated the district upon which an assessment for the expense thereof should be made. The court said: "This local assessment, it is apparent, was based upon the ground that the territory subjected thereto would be benefited by the work and change in question. Whether so benefited or not, and whether the assessment of the expense should, for this or any other reason, be made upon the district, the legislature was the exclusive judge." In Walston v. Nevin, 128 U. S. 582, 9 Sup. Ct. Rep. 192, 32 L. Ed. 544, the court said: "The determination of the taxing district and the manner of the apportionment are all within the legislative power." In Village of Norwood v. Baker, the court said (page 278, 172 U. S., page 190, 19 Sup. Ct. Rep., and page 447, 43 L. Ed.): "According to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements."

The provision in the street improvement act of this State that in cases where, in the opinion of the city council, the work of the improvement is

not "of more than local or ordinary public benefit," the cost of any street improvement shall be assessed as an entirety upon the lots and lands fronting upon the improvements, and shall be apportioned between the several lots therein according to their frontage, is a declaration by the legislature that, in the judgment of that body, the property within that district will receive a benefit from the improvement in proportion to its frontage upon the work. Unless, therefore, it is made to appear upon the face of the proceedings, or by some competent showing, that there is a gross or substantial variation from this principle, it is the duty of courts, under the rules and authorities above cited, to uphold the assessment. Before the judiciary would be justified in holding an assessment to be invalid, it should be made to appear that it is, as was said in Village of Norwood v. Baker, "in substantial excess of the benefits," or, as was said in Cleveland v. Tripp, that it "palpably transgresses" the principle upon which it is authorized. In Irrigation Dist. v. Bradley, *supra*, the court said: "The way of arriving at the amount may be, in some instances, inequitable and unequal; but that is far from rising to the level of a constitutional problem, and far from the case of taking property without due process of law." In Lent v. Tillson, *supra*, the court said: "The benefits need not be immediate. I see no just limitation in this respect, except that a tax will not be upheld when the courts can plainly see that the legislature has not really exercised its judgment at all, or that manifestly and certainly no such benefit can or could reasonably have been expected to result. The judge should not place his mere opinion against that of the legislature." In Sears v. Board, 173 Mass. 71, 53 N. E. Rep. 138, the case of Village of Norwood v. Baker was invoked against the legality of an assessment which had been made in proportion to the frontage of the property bordering upon the improvement; but the court held that the statute authorizing such assessment was not unconstitutional in its application to the facts of that case, saying: "No facts appear in the present case to show that this rule is not proper in its application to the petitioner's property as a method of determining benefits with such approximation to accuracy as can reasonably be required." See, also, Ramish v. Hartwell, 120 Cal. 443, 58 Pac. Rep. 920. There is nothing in the record herein tending to show that the appellant is entitled to invoke the principle upon which he relies to defeat the assessment. He made no objection of this nature in the court below in his answer to the complaint, nor did he offer any evidence in support of such objection, but has presented it here for the first time, in his brief in reply to the respondent. In the absence, therefore, of any facts showing that the assessment is unjust, it must be held that the statute cannot be deemed unconstitutional. The judgment and order are affirmed.

NOTE.—*Assessment of Property for Public Improvement According to the Front Foot Rule.*—The proper assessment of private property for special benefits arising from the improvement of streets and highways is to day one of the most disputed questions of law in State and federal courts of last resort. Until, however, the decision of the United States Supreme Court, in the case of Village of Norwood v. Baker, 172 U. S. 269, the authorities were so overwhelming in sustaining the right of the legislature to determine, not only what district should be considered specially benefited by the particular improvements, but also the exact extent to which the property within said district had been benefited, that text-writers admitted that the question was no longer open to debate. Elliott on Roads and Streets (2d Ed.), sec. 558; Dillon on Municipal Corporations (4th Ed.), sec. 752. Judge Dillon's clear statement of the rule, as it existed prior to this decision, is often cited: "Whether the expense of making such improvements shall be paid out of the treasury, or be assessed upon the abutting property or other property specially benefited, and if in the latter mode whether the assessment shall be upon all property found to be benefited or alone upon the abutters, according to frontage, or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency." Although the question, as far as judicial authority was concerned, appeared to have been conclusively settled, nevertheless to the minds of many eminent authorities and text writers the question had not been settled right. Dillon, Munic. Corp. (4th Ed.), sec. 761; Elliott on Roads and Streets (2d Ed.), sec. 557; Hagar v. Reclamation District, 111 U. S. 701; Parkland v. Gains, 83 Ky. 562; Seely v. Pittsburg, 82 Pa. 360; Wistar v. Philadelphia, 111 Pa. St. 604; State v. Newark, 37 N. J. L. 415; Barnes v. Dyer, 56 Vt. 469. Judge Dillon's protest pointed out the unsoundness of the principle on which the earlier cases were decided. His denunciation of the rule of legislative absolutism in assessing and apportioning the expense of improvements upon the abutting owners by frontage, or any other arbitrary method, without taking into consideration whether such owners were specially benefited to the amount of the assessment, did much to discredit the convenient excuse offered by the courts in sustaining such assessment, *i. e.*, that taxation was more a question of expediency than of justice, and that the legislature should be free to adopt what it considered to be the most practical method. In sec. 761 of his work on Municipal Corporations this learned jurist says: "Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards, or officers, or by frontage or superficial area, is a question upon which courts are not agreed. Almost all of the earlier cases assert that the legislative discretion in the apportionment of public burdens extended thus far, and such legislation is still upheld in most of the States. But since the period when express provisions have been made in many of the State constitutions requiring uniformity and equality of taxation, several courts of great respectability, either by the force of this requirement or in the spirit of it, and perceiving

that special benefits actually received by each parcel of contributing property was the only principle upon which such assessment can justly rest, and that any other rule is unequal, oppressive and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must upon principle be regarded as the just and reasonable doctrine that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited, and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury." This language of Judge Dillon was incorporated with approval in the opinion of Justice Harlan in the case of Norwood v. Baker, and its irresistible logic is traceable, either directly or indirectly, in all the later decisions.

The court, in the principal case, following the tendency of all State tribunals sustaining the discretion of their own legislatures in all matters relating to the assessment and apportionment of the expense of public improvements, undertakes to bound within very narrow limits the decision of the United States Supreme Court, in the case of Norwood v. Baker, *supra*. The court's explanation of this decision is neither fair nor satisfactory. The clear question before the court in that case was whether the entire cost of certain improvements in opening and improving a certain street in the village of Norwood could be assessed against the abutting property according to the front foot, and without taking into consideration whether the property assessed was benefited to the extent of the assessment. It was the rule of arbitrary assessment by the front foot, without regard to benefits received, that was expressly condemned and declared unconstitutional. These were the words of Justice Harlan: "As the pleadings show, the village proceeded upon the theory justified by the words of the statute that the entire cost incurred in opening the street, including the value of the property appropriated, could, where the assessment was by the front foot, be put upon the abutting property irrespective of special benefits. The assessment was by the front foot and for a specified sum representing such cost, and that sum could not have been reduced under the ordinance of the village even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefit. The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits." The decisions of federal and State courts, in following this decision, show a remarkable divergence, the federal courts commending the position taken by the supreme court and carrying it to its full logical conclusion, the State courts resisting the force of the argument and undertaking to confine it within the closest possible limits. Let us take a glance at the federal decisions. The statute of Missouri authorizing the apportionment of the cost of repairing a street in cities, on lots abutting thereon, according to the front foot, without regard to the question of fact whether or not a given parcel of land is benefited thereby to the extent of the assessment, and without affording the property owners an opportunity to question the existence of such benefits, is in contravention of the fourteenth amendment to the federal constitution, and is therefore void. Fay v. City of Springfield, 94 Fed. Rep. 409. To same effect, Loeb v. Columbia Township, 91 Fed. Rep. 37, where it was held that statute providing for the assessment of the entire cost of a public improvement on abutting property by the front foot, without reference to special benefits, rests the assessment on an illegal basis, and is void as in contravention of the provisions of the federal constitution. In Charles v. City of Marion, 98 Fed. Rep. 166, the court held that the validity under the constitution of the United States, of a statute of Indiana providing that lot owners "shall be liable to the city for their proportion of the cost of street and alley improvements in the ratio of the front line of their lots owned by them," and which apparently makes no provision for considering or determining the question of benefits to the property assessed, although it provides for a "hearing," is sufficiently doubtful, in the absence of its construction in the latter regard by the supreme court of the State, to warrant the granting of a preliminary restraining order to enjoin the enforcement of an assessment thereunder. This case, as in nearly every other authority on this question, seems to imply that if either by the express terms of the statute or by construction of the supreme court of the State, the right is given to contest the assessment and show the assessment to be in excess of benefits, such statutes would then be free from any constitutional defects. In Cowley v. City of Spokane, 99 Fed. Rep. 840, the court held that special assessments levied on abutting property for the cost of street improvements under the statutes of Washington, which requires the assessment of the entire cost of such improvements to be put on the abutting property, and which are levied by the front foot rule or other methods having no reference to benefits accruing thereto, are in violation of the provisions of the constitution of the United States against the taking of private property for public use without just compensation. It might be suggested in passing that the statement by the court in the principal case that "in no portion of the opinion (Norwood case) is it intimated that an assessment for the improvement of an existing street upon lands abutting thereon according to their frontage is invalid," is not only not warranted by the plain reading of the opinion itself, but most of the subsequent cases involve the improvement of an existing street, and the only reason given for declaring the assessment in each case invalid is the unconstitutionality of apportionment of the expense or what is known as the front foot rule. This was expressly so decided in the case of Lyon v. Town of Tonawanda, 78 Fed. Rep. 361, where the court held that an assessment made pursuant to State law for grading and improving an existing highway which apportions the entire cost of such improvement upon the abutting land according to the front foot rule, without regard to the size and value of the parcels or special benefits accruing therefrom, is in violation of the fifth and fourteenth amendments to the constitution of the United States. The decision of State courts are equally interesting. Probably the best, most interesting and exhaustive discussion of this whole question, outside of the case of Norwood v. Baker, is to be found in the case of Adams v. City of Shelbyville, 57 N. E. Rep. 114, decided April, 1900, by the Supreme Court of Indiana. In this case a statute of Indiana although providing for the assessment of abutting property according to the frontage was held not unconstitutional, because under another section a "hearing" before the common council was provided for at which the property owner could show that the assessment was in excess of the benefits. The statute, however, did not provide for appeal from the finding of the council and left the latter to finally determine the matter and "adopt"

the assessment which it may deem just, thus combining in one body legislative and judicial functions. An able and instructive dissenting opinion by Baker, J., shows what a strained construction the court was compelled to put upon the act to bring it within the rule of Norwood v. Baker. We cannot but believe that the court in that case, as in many other of the decisions of State tribunals, gave way to an unbecoming jealousy in upholding an act of its own legislature which so clearly transgressed the provisions of the fourteenth amendment as now construed by the federal courts. To provide a subterfuge in the way of a "hearing" before a tribunal which is finally to decide and apportion the assessment as to it seems "just and right" is an absurdity, and will not stand the test of federal construction. Nothing less than a fair hearing before a tribunal clothed with judicial powers and a finding not of law but of fact that the benefits equal the assessment will meet the constitutional requirements of the fourteenth amendment as now construed by the supreme court. See, also, the case of McKee v. T[illegible]ndleton, 57 N. W. Rep. 532.

Many State courts have taken the position pending further construction by the United States Supreme Court, that has been taken by the principal case, that an assessment by the front foot is not illegal or unconstitutional and will not be disturbed without proof that the assessment is unjust or greatly exceeds the benefits. State v. District Court, 82 N. W. Rep. 183; Webster v. City of Fargo, 82 N. W. Rep. 732; Shannon v. City of Portland, 62 Pac. Rep. 50; Schröder v. Overman, 55 N. E. Rep. 158; Allen v. City of Portland, 58 Pac. Rep. 509; Roberts v. Bank, 79 N. W. Rep. 1049. It is evident that the State courts as a rule are inclined to resist the logical trend of position taken by the federal courts, and persuade themselves into the belief that the Norwood case can be confined within very narrow limits. We apprehend that nothing but the clear logical position of Judge Dillon, as announced at the commencement of this annotation, and which is incorporated and commended in nearly every federal decision on the question, should be adopted as the most proper and just rule of assessment for municipal improvements.

St. Louis, Mo. A. H. ROBBINS.

WEEKLY DIGEST

1. ACTION—Parties.—Persons not interested in the subject-matter of an action, and whose rights will not be in any way affected by a final judgment therein, are not necessary parties thereto.—RUDD V. FOSSEEN, Minn., 84 N. W. Rep. 496.

2. ADMINISTRATION—Administrator—Powers.—Under Gen. St. 1894, § 5913, the personal representative of the deceased person may compromise and settle the claim arising under the statute with the party liable, without the consent of the next of kin or the probate court.—FOOT V. GREAT NORTHERN RY. CO., Minn., 84 N. W. Rep. 342.

3. ADVERSE POSSESSION—Color of Title—Partition.—Where plaintiff's prior grantor held possession of land under partition proceedings, such proceedings are color of title, within Code, § 141, declaring that possession of real estate, having known and visible boundaries, for a period of seven years, under color of title, shall give good title against all persons not under disability, except, etc.—SMITH V. TEW, N. Car., 37 S. E. Rep. 330.

4. BANKRUPTCY—Transfer of Property to Attorney.—An agreement by an insolvent debtor, made after the filing of a petition in involuntary bankruptcy against him and in contemplation of the filing of a voluntary petition, that his attorney should take certain goods in payment for his services, where there was no actual delivery or change of possession until after the adjudication upon the voluntary petition, did not constitute a transfer of the property, within the meaning of Bankr. Act, § 60d, and the goods having been removed after such adjudication and while they were in *custodia legis*, must be restored to the trustee.—IN RE CORBETT, U. S. D. C., E. D. (Wis.), 104 Fed. Rep. 872.

5. BANKRUPTCY—Withholding Property from Trustee.—On the appointment and qualification of a trustee in bankruptcy he is vested with the title to the bankrupt's property, which carries with it constructive possession. The property is thus brought into the custody of the court, and the trustee cannot be compelled to resort to a suit to recover its possession, where his right is not contested, but any one withholding such possession while making no claim to the property is guilty of a contempt of court, and may be summarily proceeded against for its recovery.—IN RE MOORE, U. S. D. C., D. (W. Va.), 104 Fed. Rep. 869.

6. BENEFICIAL ASSOCIATIONS — Sick Benefits. — The constitution of a beneficial association provided that members who should become seriously ill within six months after joining the association should receive an "arbitrary contribution" therefor, but the nature or amount of such contribution was not explained in the constitution or by-laws. A member of the association was taken seriously ill before he had belonged to the association six months, and the sickness continued over that time. Held, that he could not recover a sick benefit from the association, since the constitution and by-laws, in failing to fix the amount of the contribution, did not form a basis for recovery for a sickness commencing within the six months.—DABURA V. SOCIEDAD DE LA UNION, Tex., 59 S. W. Rep. 885.

7. BILLS AND NOTES—Action—Fraud. — In an action upon a negotiable note by an indorsee thereof, the mere allegation in the answer of fraud in the inception of the note does not throw upon plaintiff the burden of proving that he is a good-faith holder. That burden is thrown upon him only after the fraud has been established.—RAVICZ V. NICKELLS, N. Dak., 84 N. W. Rep. 353.

8. BILLS AND NOTES — Dishonor — Notice. — Where notice of protest was not given until two weeks after demand of payment of notes, the delay discharged the indorser from liability.—GERMAN-AMERICAN BANK OF ROCHESTER V. ATWATER, N. Y., 59 N. E. Rep. 768.

9. BILLS AND NOTES—Guaranty—Notice of Dishonor.—Where a guarantor is sued on a guaranty made in Ohio of a note payable in that State, it is not reversible error to read in evidence decisions of the Ohio Supreme Court, holding that notice of non-payment and demand is not necessary to fix a guarantor's liability, since, in the absence of evidence to the contrary, the common law to the same effect will be presumed to be in effect in such State.—BRADDOCK V. WERTHEIMER, Ark., 59 S. W. Rep. 761.

10. BUILDING AND LOAN ASSOCIATIONS — By-Laws—Withdrawal of Members.—A by-law enacted by a building association, providing that withdrawing members shall be paid in the order of the presentation of their applications for withdrawal, is a reasonable regulation when it does not diminish the funds out of which their claims are to be paid, and is binding on a member, though enacted after he became a member, when there is nothing in the articles of association forbidding its enactment.—EASTERN BUILDING & LOAN ASSN. v. SNYDER, Va., 37 S. E. Rep. 298.

11. BUILDING AND LOAN ASSOCIATIONS — Capitalization—Requirements of Foreign Associations. — That the statutes of a foreign State authorize a building association organized thereunder to have a larger capitalization than is permitted domestic associations does not make it against the public policy to admit the foreign association to do business in Indiana.—MACMURRAY v. SIDWELL, Ind., 58 N. E. Rep. 722.

12. CARRIERS—Interstate Shipments — Contracts. — Under Code, § 1295, providing that, when a common carrier accepts anything for transportation beyond the terminus of its own line, it shall assume an obligation for its safe carriage to such destination, unless it is released from such liability by written contract signed by the owner, a carrier accepting freight for transportation beyond its lines, which has obtained no such written release signed by the owner, is liable to such owner for an excess of freight charged over the rate agreed to by the receiving carrier, and paid to the connecting carrier at destination, though the bill of lading issued by the receiving carrier stipulated that it was not to be accountable for any damage after the freight was receipted for by a connecting carrier.—VIRGINIA COAL & IRON CO. v. LOUISVILLE & N. R. Co., Va., 37 S. E. Rep. 310.

13. CARRIERS—Loss—Negligence—Liability.—A common carrier cannot stipulate that it shall be liable for an amount less than the value of property lost by its negligence, thereby exempting itself *pro tanto* from liability, the measure of damages being the amount of the loss.—GARDNER v. SOUTHERN RY. CO., N. Car., 37 S. E. Rep. 328.

14. CARRIERS—Passenger's Baggage—Negligence.—A carrier of passengers is not liable for the loss of a package containing merchandise, shipped over its line by a passenger under the guise of baggage, where neither the carrier nor its proper agent has actual knowledge of the contents of the package, and the loss is occasioned by ordinary negligence, and not that gross negligence which amounts to willfulness and evinces a reckless disregard of the rights of others.—TOLEDO & O. C. R. CO. v. BOWLER & BURDICK CO., Ohio, 58 N. E. Rep. 813.

15. CHATTEL MORTGAGES—Conflict of Laws—Fraudulent Conveyances.—A chattel mortgage given in another State, though valid there, which would be void as to creditors if made in New York, does not pass title to property in New York as against a resident who has attached the property, and will not be enforced.—DEARING v. MCKINNON DASH & HARDWARE CO., N. Y., 58 N. E. Rep. 778.

16. CONSTITUTION LAW—Conclusiveness of State Decision.—The decision of the highest court of the State sustaining the constitutionality of Ky. Stat. 1892, § 1, requiring separate coaches for white and colored passengers, on the ground that the statute applies only to transportation between points in that State, or, if not, that the regulation of such transportation is severable from that as to interstate business, constitutes a determination of the local law, which is binding on the Supreme Court of the United States.—CHESAPEAKE & OHIO RAILWAY COMPANY v. COMMONWEALTH OF KENTUCKY, U. S. S. C., 21 Sup. Ct. Rep. 101.

17. CONSTITUTIONAL LAW—Registration Law Discriminating Between Citizens.—A registration law applicable to cities having more than 500,000 inhabitants (Mo. Act May 31, 1895), being held valid by the highest court of the State under the State constitution, does not deny to citizens residing in the only city of the State which has a population of 300,000 the equal protection of the laws, although it may be thought to be less effectual in protecting the right of voting than the statute applicable to other cities. — MASON v. STATE, U. S. S. C., 21 Sup. Ct. Rep. 125.

18. CONSTITUTIONAL LAW — Tax on Corporations—Equal Protection of the Laws.— A corporation is not denied the equal protection of the laws by N. Y. Laws 1857, ch. 456, § 3, which, as construed by the highest court of the State, provides an opportunity, in assessing the property of a corporation, to correct an undervaluation first made by the assessors, without giving the same opportunity to correct an undervaluation of the property of individuals, so long as the corporation is not assessed on any property not legally taxable, or taxed beyond the actual value of its property, and there is no proof of any general custom to undervalue the property of individuals.—PEOPLE v. BARKER, U. S. S. C., 21 Sup. Ct. Rep. 131.

19. CONTRACTS—Breach.—Where plaintiff agreed to plaster a building, and to complete the work in four weeks from the time of receiving a written notice from defendants that the building was ready for plastering, a complaint which alleged that, on notice from defendants that the building was ready, plaintiff incurred a large expense in transporting a number of men to begin the work, when the building was in fact not ready, stated facts sufficient to constitute a cause of action for breach of the contract.—BROWN v. LANGNER, Ind., 58 N. E. Rep. 743.

20. CONTRACT—Building Contract—Bond—Release of Surety.— A building contract contained a provision that alterations might be made in the plans and specifications, and that the value of the alterations should be estimated, and deducted from, or added to, the contract price, as the case might be, and that such alterations should not vacate the contract. Held, that sureties on a contractor's bond were not relieved by reasons of alteration in the plans which did not change the character of the building.—KRETSCHMAR v. GROSS, Wis., 84 N. W. Rep. 429.

21. CONTRACTS—Landowner — Permission to Build—Owner's Liability.—Where the bishop of a diocese gave the trustees of a parish, and the priest thereof, permission to erect buildings on land, the title to which was in the bishop, and, at the request of the priest, plans for buildings were prepared by an architect, the bishop, having no dealings with the architect, was not liable for his services.—ENGELBERT v. FOLEY, Mich., 84 N. W. Rep. 469.

22. CONTRACT—Parol Evidence—Variance.—In an action for a breach of a written contract to deliver a specific lot of cattle, evidence that defendant told plaintiff at the time of the sale that some of the cattle were not in the pasture, nor branded as named in the contract, was properly excluded as varying the written instrument.—DUNOVANT v. ANDERSON, Tex., 59 S. W. Rep. 824.

23. CORPORATION — Colleges — Selling Diplomas. — When the trustees of an educational institution, incorporated under the laws of this State, sign diplomas in blank, and leave them within the control of one of its officers, who sells them, and thus confers degrees without regard to merit, there is such a misuse of the power conferred as requires the dissolution of the corporation.—STATE v. MT. HOPE COLLEGE CO., Ohio, 58 N. E. Rep. 799.

24. CORPORATIONS—Denial of Corporate Existence—Estoppel.—Where plaintiff sued a corporation, and alleged its corporate existence, and obtained judgment against it as a corporation, he was estopped to maintain a bill to hold the incorporators liable for such judgment as partners, on the ground that the incorporation was defective, and that a valid corporation never existed.—SHOUN v. ARMSTRONG, Tenn., 59 S. W. Rep. 790.

25. CORPORATION—Foreign Receivership—Stockholders of Building and Loan Associations Not Credited.—Persons who subscribed for stock in a building and loan association, and paid the regular monthly dues thereon, did not, upon a dissolution of the corporation by reason of insolvency, become creditors, so as to entitle them to the benefit of the rule that allows domestic creditors of a foreign corporation, placed in the hands of a receiver in another State, to retain the assets of the corporation in the State until their claims are satisfied.—WENDON V. GRANITE STATE PROVIDENT ASSN., Ky., 59 S. W. Rep. 758.

26. CORPORATIONS—Receiver—Appointment in Foreign State.—The receiver of a foreign corporation, appointed by the courts of another State, who had not taken actual possession of the property, did not acquire such title to the property of the corporation situated in Indiana, by virtue of his appointment, as to defeat an attachment subsequently issued by a resident creditor.—GRAY V. COVERT, Ind., 58 N. E. Rep. 731.

27. CORPORATIONS—Stockholders—Evidence of Relation.—The fact that a person's name appears on the books of a corporation as a stockholder is not sufficient evidence upon which to charge him as such, but, the relation of corporation and stockholder being contractual, the assent of both parties, either express or implied, must be shown.—SIGUA IRON CO. V. GREENE, U. S. C. C. of App., Second Circuit, 104 Fed. Rep. 854.

28. COUNTY BOARD—Judgment Establishing Highway—Collateral Attack.—A judgment of the county board of commissioners establishing a highway cannot be successfully attacked collaterally unless it is absolutely void.—HELMS V. BELL, Ind., 58 N. E. Rep. 707.

29. CRIMINAL EVIDENCE—Homicide—Self-Defense—Carrying Firearms.—Deceased and defendant had been drinking, and engaged in a quarrel, and defendant stepped out of the saloon, followed by deceased, and, when at a distance of about twenty-five feet, deceased started towards defendant, saying that he had to fight, and in the ensuing scuffle defendant stabbed deceased. Deceased weighed two hundred pounds, and defendant was small, and the State's witnesses testified that deceased either had his hands in his pockets, or was pulling them out of his pockets when he attacked defendant. No firearms were found on deceased. Held, that the exclusion of evidence that deceased was in the habit of carrying firearms constituted reversible error, since such evidence was admissible in determining whether defendant acted in self-defense.—STATE V. YOKUM, S. Dak., 84 N. W. Rep. 389.

30. CRIMINAL LAW—Injunction—Continuing Trespass—Carriers—Station Grounds.—Where hackmen, who had been permitted by a railroad company to enter its station grounds to solicit passengers and baggage, continued to trespass on such grounds after notice to cease, for the reason that the company had sold the exclusive privilege to another, and such trespassing hackmen did not deny plaintiff's title to the property, or claim any right of way over the same, the company was entitled to an injunction restraining the continuance of such trespasses, since resort to actions at law would occasion a multiplicity of suits, every trespass constituting a new cause of action.—BOSTON & M. R. R. V. SULLIVAN, Mass., 57 N. E. Rep. 689.

31. CRIMINAL LAW—Innkeepers—Removing Baggage—Fraud.—Acts 1897, p. 123, §§ 1, 3, declaring that a person who removes his baggage from a rooming house without paying his bills may be imprisoned, is not contrary to the constitutional prohibition of imprisonment for debt, as the offense consists in endangering or destroying the lien, and not in leaving the debt unpaid.—STATE V. ENGLE, Ind., 58 N. E. Rep. 698.

32. CRIMINAL LAW—Instructions.—An instruction pregnant with disparaging suggestions, not based upon the evidence, and invading the province of the jury by undertaking to fix for them the probative value of impeaching testimony, is erroneous.—STRONG V. STATE, Neb., 84 N. W. Rep. 410.

33. CRIMINAL LAW—Interstate Commerce—Natural Gas.—Act March 9, 1899, prescribing that it shall be unlawful to conduct natural gas to any point outside of the State is unconstitutional, as affecting interstate commerce—natural gas, when reduced to possession, being an article of commerce—and hence the court will not enjoin such transmission; no undue appropriation nor the use of artificial means to produce an unnatural flow from the wells being alleged.—MANUFACTURERS' GAS AND OIL CO. V. INDIANA NATURAL GAS AND OIL CO., Ind., 58 N. E. Rep. 706.

34. CRIMINAL LAW—Larceny—Felonious Intent.—A subsequent appropriation of property by a bailee is not larceny, unless a felonious intent existed when he obtained possession.—STILLWELL V. STATE, Ind., 58 N. E. Rep. 709.

35. CRIMINAL LAW—Pardons—Conviction.—Under Const. art. 5, § 11, providing that the governor may grant pardons after convictions for certain offenses, a pardon granted after a verdict of guilty had been rendered, and pending a hearing in the supreme court on a bill of exceptions, but prior to the entry of sentence on the verdict, is valid, since its acceptance by the accused admits the crime, and waives the bill of exceptions, and hence the verdict was a final conviction.—PEOPLE V. MARSH, Mich., 84 N. W. Rep. 472.

36. DEATH BY WRONGFUL ACT—Action.—An action by the minor children of deceased under Burns' Rev. Stat. 1894, § 7478, providing that children, who were dependent for support on a person killed by reason of a violation of the coal-mining act, may maintain an action therefor against the mine owner, brought more than three years after the death of their parent, cannot be maintained under *Id.*, § 285, providing that an action for death caused by a wrongful act must be commenced within two years, which applies to actions by infants as well as adults.—ELLIOT V. BRAZIL BLOCK COAL CO., Ind., 58 N. E. Rep. 736.

37. DEATH BY WRONGFUL ACT—Damages—Nebraska Statutes.—The action for wrongful death, authorized by the Nebraska statute (Comp. St. 1897, ch. 21), under the construction of such statute by the supreme court of the State, is one which can be maintained only for the pecuniary loss sustained by the next of kin of the deceased, for whose benefit the recovery is permitted, and general damages are recoverable only where such next of kin are persons who were dependent upon the deceased for their maintenance, or to whom he was under legal obligation to furnish such maintenance. In other cases there can be no recovery unless special damages to the next of kin are alleged and proved.—THOMPSON V. CHICAGO, M. & ST. P. RY. CO., U. S. C. C., D. (Neb.), 104 Fed. Rep. 845.

38. DEED—Designation of Grantee.—A deed of real estate, to be effective as a conveyance of title, must designate a grantee, otherwise no title passes; but it is sufficient if the deed, when construed as a whole, distinguishes the grantee from the rest of the world.—HENNIGES V. JOHNSON, N. Dak., 84 N. W. Rep. 350.

39. DEED—Life Estate—Reservation—Inconsistency.—A deed in fee reserving a life estate in the grantor, "with the absolute control of the said real estate as if this conveyance had not been made," is not void for inconsistency, the reservation not authorizing the life tenants to destroy the remainder-man's title by another conveyance; and hence the payee named in the deed can maintain a suit for the consideration.—HAINES V. WEIRICK, Ind., 58 N. E. Rep. 712.

40. DISCOVERY—Inspection—Statutes.—Under Code, § 579, providing that the court before which an action

is pending, in its discretion, on due notice, may order either party to give to the other inspection of any papers in his possession containing evidence relating to the merits of the action or defense, an order that plaintiff give inspection of a check in his possession to persons other than defendant is erroneous.—SHEEK v. SAIN, N. Car., 37 S. E. Rep. 334.

41. DRAINAGE LIENS — Nature.—Under the law authorizing the construction of drains and ditches by counties, whereby the cost of the same is made a charge upon the lands benefited, and a lien is imposed thereon to secure the county, such lien attaches at the time provided for in the statute, and the privilege given to the landowner to pay the same in subsequent assessments does not change the nature of such lien, nor control the time when the lien takes effect, which is upon the auditor's statement under sections 7810 and 7811, Gen. St. 1894.—CLAPP v. MINNESOTA GRASS-TWINE CO., Minn., 84 N. W. Rep. 344.

42. ELECTION OF REMEDIES.—Before a case can arise for the application of the principle of election of remedies, there must be (1) two co-existing remedies, and (2) those remedies must be so inconsistent that a party cannot logically choose one without renouncing the other.—STATE v. BANK OF COMMERCE OF GRAND ISLAND, Neb., 84 N. W. Rep. 406.

43. EVIDENCE — Declarations.—In a suit to foreclose a mortgage, brought by an assignee for value after the mortgagee's death, evidence of declarations of the mortgagee, made prior to the assignment, to the effect that she had agreed to surrender the mortgage to defendant as fully paid, in consideration of services rendered, was properly rejected, under the rule that declarations of an assignor of a chose in action, made before he parted with his interest, are inadmissible against an assignee.—MERKLE v. BEIDLEMAN, N. Y., 58 N. E. Rep. 757.

44. EVIDENCE OF OWNERSHIP.—Ordinarily a statement as to the ownership of property is a statement of fact, and in such cases a direct answer is admissible. Where, however, it is a mixed question of law and fact, and a witness has answered against the objection that the question calls for a conclusion, the error may be cured by a disclosure of the facts upon which the conclusion is based, either in direct or cross-examination.—OLSON v. O'CONNER, N. Dak., 84 N. W. Rep. 359.

45. FEDERAL COURTS—Jurisdiction—Rights of Tribal Indian.—An action to recover damages for the illegal arrest and imprisonment of the plaintiff under the laws of the State, where the claimed illegality is based upon allegations that plaintiff is a tribal Indian, and not subject to State jurisdiction, and that defendants, in instituting the prosecution against him, acted in their official capacity as Indian agent and Indian school superintendent respectively, of the United States, involves the construction of the laws and treaties of the United States, and is of federal cognizance.—PETERS v. MALIN, U. S. C. C., N. D. (Iowa), 104 Fed. Rep. 849.

46. FRAUD, STATUTE OF — Memorandum—Parties.—A memorandum purporting to be an agreement between two parties to convey certain land is not defective, under the statute of frauds, where the same is signed by a third party, in that it does not show such third party to be an agent for the promisor, since the fact of such agency may be proven by any competent evidence.—PHILLIPS v. CORNELIUS, Miss., 28 South. Rep. 871.

47. FRAUDS, STATUTE OF — Sufficiency of Writing.—Plaintiff in an action for breach of contract alleged that defendants employed him to sell goods on commission for one year in the Southern States. The contract, which was evidenced by letters, did not specify the territory in which he was to sell, except that defendants stated in one of their letters to him that the "parties carrying our line in your territory" were certain designated persons in seven Southern States named, but whether he had the right to sell in four other States commonly known as Southern States was not stated. Held that, the territory in which he had the right to sell being one of the essential terms of the contract of employment, the letters did not show a completed contract in writing, required by the statute of frauds (Code, § 2840, cl. 7), requiring agreements not to be performed within one year to be in writing expressing the essential terms thereof.—BAHM v. KLEENER, Va., 37 S. E. Rep. 292.

48. FRAUDULENT CONVEYANCE—Action to Set Aside—Surety.—A surety on an undertaking to pay the costs on an appeal and damages, who has not been compelled to pay the same, cannot maintain a suit in equity to set aside a fraudulent conveyance of property of his principal, and have the judgment paid out of the proceeds thereof.—ELLIS v. SOUTHWESTERN LAND CO., Wis., 84 N. W. Rep. 417.

49. FRAUDULENT CONVEYANCES — Burden of Proof.—In an action by a husband's creditors against his wife to set aside a deed in trust, purporting to secure a debt owing the wife, as being in fraud of such creditors, the burden of proof is on the wife to show the *bona fides* of the alleged transaction between herself and husband.—RUNKLE'S ADMR. v. RUNKLE, Va., 37 S. E. Rep. 279.

50. HOMESTEAD — Purchase With Pension Money.—Land is not exempt as a homestead from the payment of a debt contracted before its purchase, though the purchase was made with a check for pension money which was exempt.—CURTIS v. HELTON, Ky., 39 S. W. Rep. 745.

51. HUSBAND AND WIFE — Estoppel—Adverse Possession.—Where a husband, joint grantee with his wife, returned a deed to the grantor, and requested the execution of a new one to the wife, which was done, and the wife took possession and claimed title thereunder, though such transaction passed no additional interest to the wife, it precluded the husband from asserting his joint interest as against her, and hence he had no interest in the land which the grantor could subject to his vendor's lien.—POINDEXTER v. RAWLINGS, Tenn., 39 S. W. Rep. 766.

52. HUSBAND AND WIFE — Validity of Judgment Against Married Woman.—Under the married woman's act of March 15, 1894, a married woman cannot resist the enforcement of a judgment against her on the ground that she was liable only as surety in the note upon which the judgment was rendered, as that defense could have been made in the original action.—WREN v. FICKLIN, Ky., 39 S. W. Rep. 746.

53. INDEPENDENT JUDGMENT AS TO FEDERAL QUESTION—Impairing Obligation of Contract.—The competency of a State, through its legislation, to make an alleged contract, and the meaning and validity of such contract, are matters which the Supreme Court of the United States, on writ of error to a State court, must determine for itself by an independent judgment, as an exception to the general rule that it will accept the decision of the State supreme court on the construction of the State constitution, though in determining the matter it may lean toward the interpretation placed thereon by the State court.—STEARNS v. STATE, U. S. S. C., 21 Sup. Ct. Rep. 73.

54. INJUNCTION — Order to Restrain Gambling.—Where an application was made by the State for an order to restrain defendants from keeping and maintaining a gambling house, and the premises where the gambling was carried on were out in the country, one-quarter of a mile from the nearest residence, and there was no evidence that there had been any injury to property rights from the unlawful acts of the defendants, or that any such injury was likely to be sustained, plaintiff was not entitled to the order, since no necessity for the exercise of equity jurisdiction was shown.—STATE v. O'LEARY, Ind., 58 N. E. Rep. 703.

55. INTOXICATING LIQUORS — License Tax.—Sess. Laws 1897, ch. 72, imposing an annual tax on parties

without the State who have wholesale establishments for the sale of liquors in this State, to be paid in every precinct, township, or city where they have such wholesale establishments, and providing that manufacturers of such liquors within the State shall pay a certain manufacturer's license and be exempt from the payment of the wholesale tax, is unconstitutional, as in conflict with Const. U. S, art. 1, § 8, giving congress power to regulate commerce among the States.—STATE v. ZOPHY, S. Dak., 87 N. W. Rep. 891.

56. LANDLORD AND TENANT—Lease — Covenant—Validity.—A covenant by a lessee not to sell any beer on the leased premises except that manufactured by a named brewing company is not void as against public policy.—FERRIS v. AMER. BREW. CO., Ind., 58 N. E. Rep. 701.

57. LIFE INSURANCE — Mutual Insurance — Assessments.—Where a member of a mutual insurance company has obligated himself to pay such annual assessments as shall be made, not to exceed a specified sum each year, and in anticipation of an annual assessment pays to the treasurer the amount of an annual assessment in advance, and such assessment is not in fact made, the sum so paid stands to his credit, and he has a right to apply the same on an assessment for a succeeding year.—MONTGOMERY v. HARKER, N. Dak., 84 N. W. Rep. 869.

58. LIMITATIONS — Amendment.—The doctrine that the bar of the statute of limitations extinguishes the right involved and creates a new one in the adverse party which is in the nature of property, within the meaning of that term as understood in respect to constitutional guaranties, is not in harmony with the doctrine that the defense of the statute of limitations is unconscionable and that a trial court may, in the exercise of its discretionary power, on that ground alone, refuse in all cases to permit it, where its availability depends upon judicial favor.—WHEREATT v. WORTH, Wis., 84 N. W. Rep. 441.

59. LIMITATION OF ACTIONS—Pleading.—A party cannot avail himself of the statute of limitations in a suit in equity by a demurrer to the bill, but the defense must be set up by a plea or answer, though the bill states a cause of action which is barred by the statute.—HUBBLE v. POFF, Va., 37 S. E. Rep. 277.

60. MASTER AND SERVANT—Contributory Negligence.—Where deceased who was engaged in digging a trench for a water main where the ground was solid, was ordered to another part of the trench, which had been dug by other workmen, where the ground was loose, and largely composed of gravel, the fact that deceased walked along the bottom of the trench to the designated point, and had a good opportunity to notice the change in the character of the soil, was not sufficient to charge him with contributory negligence, since, in the absence of warning, he had the right to assume that defendant had furnished him a safe place to work.—CITY OF FT. WAYNE v. PATTERSON, Ind., 58 N. E. Rep. 747.

61. MASTER AND SERVANT—Negligence—Assumption of Risk.—Where plaintiff, while holding a piece of iron pipe over the head of a bolt which was being driven, was injured by a chip flying from the pipe, and it appeared that the bolts were usually protected by holding some such metal over them, but that copper hammers had been made for a number of years for such work, and that piping was the least desirable of the metals used, because of its brittleness, the question of defendant's negligence in failing to provide proper material was for the jury.—LITTLEFIELD v. EDWARD P. ALLIS CO., Mass., 58 N. E. Rep. 692.

62. MECHANIC'S LIEN — Foreclosure. — To entitle a party to foreclose a mechanic's lien upon a building only, and sell the same separate and apart from the land upon which it stands, it is necessary, under the present mechanic's lien law of this State (sections 4789-4801, inclusive, Rev. Codes), that the complaint should show either that the building was erected by one who had a leasehold interest in the land whereon the building is situated, and that the lease has become forfeited, or that there were existing liens upon the land at the time the materials were furnished or labor done for which the lien is claimed.—GULL RIVER LUMBER CO. v. BRIGGS, N. Dak., 84 N. W. Rep. 849.

63. MORTGAGE—Cancellation—Consideration.—A executed and delivered to B his non-negotiable promissory note, and secured the same by mortgage upon realty. B, in consideration thereof, agreed to have certain claims against A, which were held by third parties, and which were liens upon such realty, satisfied of record, no time for performance being fixed. B sold the note and assigned the mortgage to C, but failed to have the prior liens satisfied in whole or in part. A brings an action against C to have the note and mortgage canceled. Held, that the action could not be maintained.—THONSON v. PRESIDENT, ETC. OF COLBY UNIVERSITY, N. Dak., 84 N. W. Rep. 474.

64. MORTGAGE—Delivery.—The maker of a note authorized the payee to procure a loan for her from a third party named, and agreed to execute a note and mortgage on her land to secure the same, and permit the payee to retain the loan as part payment on the note. Shortly thereafter the payee called on her with a notary, and she executed the note and mortgage agreed on, and handed the same to him, and he thereupon credited the amount on her note. The following day he took the note and mortgage to the mortgagee, who, after inspecting them, paid him the amount of the indorsement. Held, that the note and mortgage were delivered when they were signed and handed to the payee to secure the loan, and *eo instanti* became a valid lien.—MERRITT v. TEMPLE, Ind., 58 N. E. Rep. 699.

65. MUNICIPAL BONDS — Recitals — Notice to Purchasers.—Rev. St. Ohio, § 2708, relating to municipal bonds, requires that "all bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued and under what ordinance." The only reference to any ordinance contained in bonds issued by a village, purporting to be refunding bonds, was a statement that they were issued to take up former bonds of a certain date, "as provided in the ordinance of said village." It was admitted that no valid or sufficient ordinance authorizing the issuance of such bonds was passed, and that the bonds refunded were void. Held, that under such statute every purchaser was charged with notice of their invalidity.—UNITED STATES TRUST CO. v. VILLAGE OF MINERAL RIDGE, U. S. C. C. of App., Sixth Circuit, 104 Fed. Rep. 851.

66. MUNICIPAL CORPORATIONS — Defective Sewer — Death of Pupil—Liability.—A municipal corporation is not liable for the death of a pupil in a public school in consequence of a defective sewer, the injury being occasioned in the performance of a public service.—FOLK v. CITY OF MILWAUKEE, Wis., 84 N. W. Rep. 420.

67. MUNICIPAL CORPORATIONS—Powers Over Streets—Removal of Telephone Poles.—A grant of power to a city by its charter to prevent the incumbering of streets by wagons, carriages, lumber, posts, etc., or any other materials whatsoever, gives only the right of police regulation, and the power to prevent the obstruction of the streets unlawfully, and under such power the city cannot require the removal from the streets of telephone poles and wires erected under lawful authority from the State, where such action is not based upon any finding or claim that the poles or wires interfere with the safety or convenience of ordinary travel, but is taken solely in the interests of a rival company, or to compel the company owning such poles and wires to pay for a franchise to maintain the same.—ABBOTT v. CITY OF DULUTH, U. S. C. C., D. (Minn.), 104 Fed. Rep. 833.

69. NEGLIGENCE.—Under Rev. St. U. S. § 563, "saving to suitors the right of a common-law remedy where

the common law is competent to give it," a "limitation of liability" pleaded in action against the individual owners of a vessel for injuries sustained in a collision was not available, being applicable only when a remedy in admiralty is sought.—DUFFY v. GLEASON, Ind., 58 N. E. Rep. 729.

69. OFFICERS—Holding Over.—Holding over beyond the fixed term of an officer pending the election of a successor in pursuance of the requirements of the constitution is as much a part of the term of office as that which precedes it.—STATE v. MOORES, Neb., 84 N. W. Rep. 399.

70. PARENT AND CHILD—Services of Child—Presumption.—Where a boy was received into a family as a son, under defective adoption papers, and services were rendered by him in that capacity, there was a presumption that they were not to be paid for, which presumption could be abutted only by proof, direct or circumstantial, establishing a direct contract to pay for the services.—MARTIN v. MARTIN'S ESTATE, Wis., 84 N. W. Rep. 439.

71. PRINCIPAL AND AGENT — Notice.—To charge a principal with knowledge or notice on the part of his agent, which said knowledge or notice came to the agent prior to his employment as such agent, it must appear that such knowledge or notice was present in the mind of the agent when he acted for the principal in the transaction in which the principal is sought to be charged with such knowledge or notice.—GREGG v. BALDWIN, N. Dak., 84 N. W. Rep. 378.

72. PRINCIPAL AND SURETY—Bonds—Failure of Surety to Sign.—Where all the sureties who sign a bond deliver it, it is binding on them, unless the obligee then knew that all who were to sign the bond had not done so, the presumption from an unconditional delivery being that the failure of others to sign is waived.—TURNBULL v. MANN, Va., 37 S. E. Rep. 288.

73. PRINCIPAL AND SURETY—Liability of Surety.—A bond conditioned that the obligor shall conduct a business in the name of the obligee for a certain time, and shall purchase and pay for all stock necessary therefor, does not make a surety thereon liable for stock purchased by the obligor at the time bond was executed, since it only applies to stock thereafter purchased.—WUSSOW v. HASE, Wis., 84 N. W. Rep. 433.

74. PRINCIPAL AND SURETY — Release of Surety—Extension of Time.—A creditor by extending time of payment to his debtor without the knowledge or consent of a surety, thereby releases such surety. It is necessary, however, to the validity of such extension, that it be upon a sufficient consideration, and to a definite time.—MCCORMICK HARVESTING MACH. CO. v. RAE, N. Dak., 84 N. W. Rep. 346.

75. RAILROAD COMPANY—Crossings—Failure to Give Signals.—While, generally, a railroad company is not required to give signals of the approach of trains to private crossings, yet the circumstances may be such as to require it; and where the crossing, which was a dangerous one, had been used for a long time, not only by the adjoining landowner, but by the public, and it had been customary to give signals of the approach of trains thereto, the failure to give any warning of the approach of a special train at a rapid speed was negligence.—LOUISVILLE & N. R. CO. v. BODINE, Ky., 59 S. W. Rep. 740.

76. RAILROAD COMPANY—Fire—Damages.—In an action for negligence for injury to a number of growing fruit trees by fire, a recovery may be had by ascertaining as the amount of damages the difference in value of the fruit trees as standing immediately before and after the injury complained of.—MISSOURI PAC. R. CO. v. TIPTON, Neb., 84 N. W. Rep. 416.

77. RES JUDICATA—Judgment.—A decision cannot be held *res judicata* on a question of title by reason of certain language used by way of reasoning in the opinion, when the substantial effect of the decision is that the title will not be adjudicated in equity, and that the bill must be dismissed, but without prejudice to an action at law.—H. ABRAHAM & SON v. CASEY, U. S. S. C., 21 Sup. Ct. Rep. 88.

78. RESCISSION—Action.— Where goods are sold on credit extended in reliance on false and fraudulent statements to a mercantile agency made by the purchaser, the seller has the right either to disaffirm the sale and proceed in replevin to recover the goods, or he can waive the tort and sue for the purchase price before the term of credit has expired.— HEILBRONN v. HERZOG, N. Y., 58 N. E. Rep. 759.

79. SALES—Warranty—Extension by Parol.— Where plaintiff sold defendant an engine, and warranted it, in writing, "to do as good or better, and as fast or faster, work as any other machinery of the same size, and manufactured for a like purpose," and the warranty expressly provided that no person had any authority to add to or abridge or change it in any manner, the fact that the engine was sold to defendant for the purpose of doing all kinds of work connected with a farm, especially for the purpose of furnishing power to a separator in threshing grain, did not extend the written warranty so as to constitute a warranty that the engine would do the work for which it was sold, since the written warranty expressly provided that it could not be extended.—REEVES & CO. v. BYERS, Ind., 58 N. E. Rep. 713.

80. TAXATION—Collection.—Courts will not entertain suits by the commonwealth to enforce the collection of taxes, where there are statutes prescribing adequate remedy for their collection.—MARYE v. DIGGS, Va., 37 S. E. Rep. 315.

81. TORTS—Unlawful Act — Fright.—A complaint alleged that defendant, knowing complainant to be weak, and just convalescent from illness, and unable to stand any nervous shock, entered on the lands of her husband, and quarreled with him in hearing of complainant, knowing such quarrel would shock complainant; that defendant used abusive language, and refused to leave the premises until forced to do so by complainant's husband producing a revolver; and that defendant's conduct caused complainant such fright as to cause her a great mental shock rendering her unconscious. Held, that the complaint did not state a cause of action.—GASKINS v. RUNKLE, Ind., 58 N. E. Rep. 740.

82. TRADE-NAMES — Enjoining Use — Advertising.—Complainants, who have sold certain goods for many years, and widely advertised their business under the name of the "Manufacturers' Outlet Company," which name they have registered as a trade-mark, are entitled to restrain the use of the name "Taunton Outlet Company" by another in the same business in their advertising, such words having a tendency not being intended to lead persons to believe that it was the complainants' place of business.—SAMUELS v. SPITZER, Mass., 56 N. E. Rep. 693.

83. TRUSTS—Mistake in Deed — Husband and Wife.—Where a deed to a husband as trustee for the wife provided by mistake or fraud that, if she should die without issue, the husband should become the owner of the property conveyed free of the trust, the heirs of the husband cannot plead the statute of limitations in bar of an action to correct the deed, as they, having taken with notice of the trust, also became trustees.—SCHWARTZ v. CASTLEN, Ky., 59 S. W. Rep. 743.

84. WATERS AND WATER COURSES—Water Company—Implied Contract.—The fact that a company incorporated for the purpose of furnishing water to a city commences to furnish water to plaintiff under contract, and continues to furnish water for 10 years, and receives compensation therefor, is sufficient to establish an implied contractual relation between the company and the plaintiff, which will prevent the dismissal of a bill to restrain the company from cutting off the water, on the ground that there was no contractual relation between the parties which would warrant the suit.—MCENTEE v. KINGSTON WATER CO., N. Y., 58 N. E. Rep. 785.